(23)

No. 539

IN THE

Supreme Court of the United States

October Term 1944

AMEY THLOCCO, LORIN RAY, Guardian of the Person and Estate of Amey Thlocco, an incompetent person, and OREL BUSBY, Special Guardian Ad Litem,

Petitioners,

VERSUS

MAGNOLIA PETROLEUM COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

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Amey Thlocco, by her Guardian ad litem, Orel Busby, and by Lorin Ray, duly appointed Oklahoma guardian of her person and estate, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, which became final May 23, 1944, affirming the judgment of the United

States District Court for the Eastern District of Texas, Texarkana Division, dated May 12, 1943.

Opinion Below

The District Court did not file an opinion in this cause. The opinion of the Circuit Court of Appeals is reported in 141 Fed. (2) 934.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 12, 1944, and petition of appellants for rehearing was overruled on May 23, 1944.

The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether the lower courts correctly held that Amey Thlocco, an enroller restricted full blood Seminole Indian, was not entitled to invoke the Act of May 27, 1908, sec. 1, 35 Stat. 312, as amended April 12, 1926, sec. 1, 44 Stat. 239, and extended May 10, 1928, sec. 2, 45 Stat. 495 (Appendix, *infra*, P. 49), imposing restriction upon certain lands and funds of members of the Five Civilized Tribes of Indians; also, the Act of January 27, 1933, sec. 8, 47 Stat. 777 (Appendix, *infra*, p. 49), authorizing the creation of a trust of property of restricted Indians

only through the approval of the Secretary of the Interior.

2. Whether such restrictions imposed upon certain lands and funds of members of the Five Civilized Tribes of Indians are confined to such funds and lands only in the State of Oklahoma, or whether such restrictions follow such funds and lands beyond the territorial limits of that state and into the State of Texas.

3. Whether the judgments of the lower Federal courts in Texas which refused to accept the status of Amey Thlocco as determined by the proper courts of Oklahoma, the state of her residence, declaring her an incompetent, are violative of the full faith and credit clause of the Federal Constitution.

4. Whether the judgments of the lower courts in Texas in holding that in the premises declared upon, the district court could ignore the status of Amey Thlocco as defined by Oklahoma, the state of her residence, and declare her a competent in Texas, is violative of Rule 17 of the Federal Rules of Civil Procedure.

5. Whether a Federal district court in Texas, which has no probate authority to appoint a guardian, as distinguished from a county or state court of Texas which does have such authority, may pass upon the status or competency of one already adjudicated incompetent by a proper court of Oklahoma.

6. Whether the judgments of the lower courts and the opinion of the Circuit Court in the premises declared upon, are inconsistent with the opinion of this Court in *Klaxon Company* v. *Standard Electric Manufacturing Company*, 313 U. S. 487, 61 S. C. 1020; especially since the public policy of both Oklahoma and Texas is to the effect that an incompetent may be divested of title to real estate only through proper guardianship sale, and there was no guardianship sale of the property involved here, either in an Oklahoma or a Texas state probate court.

7. Whether the lower courts correctly held that Art. 7425a, Revised Statutes of Texas, is properly applicable to Texas realty, title whereof was vested in a duly adjudicated incompetent resident of Oklahoma by a judicially approved compromise and settlement of a valid Oklahoma judgment, to compensate appellant for restricted funds filched by a faithless guardian, in view of the fact that the Texas Trust Act of which Art. 7425a is a part is conclusive that it was beyond the legislative intent that said Act should apply to estates in guardianship.

8. Whether the so-called trust, if there was a trust as a matter of law, was an express trust as pronounced by the Texas courts or a resulting or implied trust as contended by petitioners. Section 7425a as applied in favor of respondent depends upon the nature of the trust involved here.

9. Whether an oil and gas lease executed in Oklahoma and void in its inception under Oklahoma laws may be-

come valid by assignment to a respondent in Texas claiming to be an innocent purchaser under the laws of notice.

10. Whether the lower courts correctly held that Magnolia Petroleum Company was an innocent purchaser in the premises within the purview of Art. 6627, Revised Statutes of Texas, as the term "innocent purchaser" in such premises has been defined by the courts of Texas.

11. Whether a full blood, enrolled restricted and adjudicated incompetent Indian can ratify a void oil and gas leas and estop herself from proclaiming its invalidity by any personal act.

12. Whether the judments of the lower courts and the opinion of the Circuit Court are not in direct conflict with many opinions of this court and the opinions of other circuit courts hereinafter pointed out. If conflicting, whether the particular questions involved herein should be passed upon and settled directly by the Supreme Court of the United States.

Statement

Amey Thlocco is a duly enrolled full blood Seminole Indian, Roll No. 1516. She has always resided in Wewoka, Seminole County, Oklahoma. She received moneys from her restricted allotted lands and at the death of her full blood Indian father in 1929 she inherited certain restricted lands and moneys. Almost immediately she became a victim of swindlers, with the result that she was

duly adjudicated an incompetent and both her person and estate were placed in guardianship in 1929. Her incompetency was further declared by Federal Judge Williams whose findings were reviewed and approved by the Tenth Circuit Court of Appeals in *Kiker* v. *United States*, 62 Fed. (2) 957. (R. 115)

The first guardian of her person and estate, Hugh Barham, misappropriated approximately $16,000 of the restricted funds of Amey Thlocco. When this misappropriation was discovered, Barham was removed; his account was surcharged with the amount of his misappropriation; Kenneth Mainard was appointed his successor as guardian and ordered to institute suit against the surety of Barham in the Oklahoma district court, which he did. In this suit judgment was rendered against said surety and in favor of the estate of Amey Thlocco in the full amount of his misappropriation. (R. 115)

Thereafter, Fidelity Union Casualty Company, a Texas corporation, the surety of Barham, tendered compromise and settlement of this judgment (R. 118), which was duly approved (R. 124) by the County Court of Seminole County, Oklahoma, in which the guardianship was pending. Among the res thus tendered by the Surety Company was the fee title to certain realy in Titus County, Texas. The title to the mineral estate in one of these tracts of Texas realty is the res in controversy in this suit.

The order approving the compromise and settlement was entered November 15, 1934 (R. 124). This order recites that the court found the compromise and settlement "to the best interests of the estate of Amey Thlocco" and ordered Kenneth Mainard, her guardian, to "satisfy the judgment against the Surety Company upon delivery to him of good and sufficient deeds."

Mr. M. S. Robertson, then United States Probate Attorney at Wewoka, Oklahoma, also approved the compromise and settlement and furnished this guardian and his attorneys with a form of deed specifically designating that the deed be excuted by the Surety Company to Kenneth Mainard "as Trustee for Amey Thlocco". (R. 224) Instead of forwarding the form of deed furnished them by the United States Probate Attorney, Mr. Ledbetter, attorney for Walter Billingsley who had been appointed guardian ad litem for Amey Thlocco in the Oklahoma court, wrote a letter to Fidelity Union Casualty Company instructing it (R. 226) to execute the deed "to Kenneth Mainard, Trustee". This it accordingly did on November 15, 1934. (R. 131) Admittedly Mr. Ledbetter so instructed Fidelity Union Casualty Company to thwart the guardianship code of Texas. (R. 746) He profited by this later, in his dealings with the Magnolia on this property. (R. 748, 757)

Although this deed was duly recorded in Titus County, Texas, it was never exhibited to the County Court of Seminole County, Oklahoma, or to the United States Probate Attorney at Wewoka, Oklahoma. Kenneth Mainard

never qualified as guardian of this Texas estate of Amey Thocco nor was there an ancillary guardian in Texas ever appointed as provided by the Texas statutes. Art. 4132, 4285, Chapter 13, Revised Civil Statutes, Texas. (Appendix, *infra*, p. 64), Kenneth Mainard paid the taxes on these Texas lands out of moneys he received as Oklahoma guardian of the estate of Amey Thlocco.

On February 14, 1936, Kenneth Mainard, acting in the dual capacity of guardian and trustee for Amey Thlocco, filed in the County Court of Seminole County, Oklahoma, through his attorneys, Billingsley and Kennerly, an application to sell an oil and gas lease on 130¾ acres of these Titus County, Texas lands to Bat Shunatona of Wewoka, Oklahoma, then the law partner of Mr. Ledbetter, for $5 per acre. (R. 52) On the same day an order was entered by the County Court of Seminole County, Oklahoma, approving the sale of said lease to Shunatona; the oil and gas lease was executed on that day by "Kenneth Mainard, Trustee", for a consideration of $5 per acre. (R. 136) Mr. Ledbetter admitted he was the moving spirit in procuring the lease and owned an interest in it. (R. 748, 757) On this point the trial court found (R. 68):

> "* * * that the purchasers of the said oil and gas lease in question were Bat Shunatona and his law partner, Louis Ledbetter, both of whom had been for many years residents of Wewoka, Oklahoma, and knew all the circumstances surrounding the condi-

tions of the the title to said lands in Titus County, Texas; that the laws of Oklahoma with reference to guardianship sale or sales of trust property were not complied with, either as to the jurisdiction of Oklahoma County Courts of guardian's sales of oil and gas lease or as to the jurisdiction of District Courts of Oklahoma over the sale of oil and gas leases by a trustee."

Four days after the execution of the lease Mainard, Ledbetter and Billingsley went to Dallas, Texas and resold this mineral estate to Magnolia Petroleum Company for $50 per acre. On this point the trial court found (R. 70):

"5 That the said original lease shows on its face that it was executed in Seminole County, Oklahoma on February 14, 1936, by Kenneth Mainard, Trustee, to Bat Shunatona of Wewoka, Oklahoma, for a consideration of $5.00 per acre; that the said Kenneth Mainard, trustee and guardian together with Louis Ledbetter, appeared at plaintiff's office in Dallas, Texas, within a short time thereafter with said original lease and an assignment of the same, which assignment had been executed by Bat Shunatona in Seminole, County, Oklahoma, with the name of the assignee not filled in; that Kenneth Mainard then entered into negotiations for the sale and assignment of said lease with Charles Gladden, then vice-president of and lease purchasing agent of plaintiff; that the said Charles Gladden was a former resident of Wewoka, Oklahoma and then in the employment of the Magnolia Petroleum Company; that he was personally acquainted with Kenneth Mainard

and Louis Ledbetter and knew they were residents of Wewoka, Seminole County, Oklahoma; that the said Kenneth Mainard, trustee, offered said lease to Charles Gladden for a consideration of $50.00 per acre; that after said lease was offered to him in his office the said Gladden then consulted with Ralph Talley and examined the Magnolia's maps which were in an office other than his own; that he directed Talley to purchase the lease in question at a price not to exceed $50.00 per acre; that he then introduced Kenneth Mainard and Louis Ledbetter to Ralph Talley who concluded the negotiations for the purchase of said lease for $50.00 per acre; that one requirement made by plaintiff with reference to title was that a new assignment of the lease be procured from Shunatona with the name of Magnolia Petroleum Company written into the same as assignee."

Magnolia Petroleum Company had a branch office with a lease purchaser in charge at Wewoka, Oklahoma, at the time it purchased this lease. Petitioners contended the evidence was clear and convincing that this lease purchaser knew in advance all the facts with reference to Amey Thlocco's ownership of the lands and of the purported lease sale at Wewoka, Oklahoma. The trial court found (R. 55-56, 68-70) that the Magnolia had a district office located in Wewoka, Oklahoma; that Dow Dunaway, its lease purchaser in charge, was advised by the United States Probate Attorney in advance of the prospective sale of the lease on Amey Thlocco's Texas lands; that Dunaway in advance of the sale obtained a description

of the lands in Texas. The court further found, however, that the information he obtained as Magnolia's agent was not acquired as a part of his duties or within the scope of his employment. Dunaway died prior to the trial of the case and his evidence was not available.

The proof also showed that prior to the purported lease sale in Wewoka, Oklahoma a well for oil and gas was drilling near the Thlocco property in Texas and that Magnolia was receiving geological information and, through its agents and officials, knew the value of this lease prior to the purchase from Mainard and Ledbetter (R. 275-277). Petitioners contended that Magnolia was willing to take a chance on its title rather than have a guardian appointed for Amey Thlocco in Texas and have a public sale of the lease in Texas. Petitioners also argued that this evidence showed collusion and fraud between Mainard, Ledbetter, et al. and Magnolia in the original sale and resale of the lease to Magnolia. This evidence caused the trial court to make the following observation during the trial: (R. 420)

> "Billingsley, Ledbetter, Mainard, they were all together. I would not believe any of them. They were not taking any chances, Shunatona's check was not cleared until after Magnolia's check cleared the bank."

The checks referred to were Shunatona's check to Mainard for $653.50 and Magnolia's check to Shunatona for $6,537.50. (R. 717) These checks represented the respective sale prices of the lease.

Magnolia entered on the property and drilled a number of wells which produced. It then filed this action in the United States District Court for the Eastern District of Texas, Texarkana Division, against Amey Thlocco to quiet title to its leasehold and test its validity.

Motion to dismiss for lack of jurisdiction over the person of Amey Thlocco was filed (R. 5), in which the trial court was advised that Amey Thlocco is a full blood restricted Indian. The court refused to dismiss the action. Subsequently Magnolia filed a "Suggestion of Plaintiff of Uncertainty of Status of Defendant, Amey Thlocco" (R. 14) and therein suggested the appointment by the trial court of a guardian ad litem so it could carry on its litigation against Amey Thlocco and quiet title to its lease in a Texas Federal district court. The court found (R. 15) that Amey had been "adjudged an incompetent under the laws of the State of Oklahoma, but that her status under the laws of the State of Texas has not been determined" and then proceeded to appoint a guardian ad litem for her so Magnolia could continue its litigation against her in a Texas Court. Nowhere in its pleadings did Magnolia advise the court that Amey Thlocco was a full blood restricted Indian. Nor did it notify the Secretary of the Interior pendency of this action or make the United States Government a party defendant. *Minnesota* v. *Uinted States*, 305 U. S. 382; *United States* v. *Hellard*, 88 L. Ed. 929.

For answer to plaintiff's complaint Amey Thlocco set up her incompetency and the personal restrictions existing against her as a full blood Indian and the restricted status of the land in question. She alleged that she was the real and beneficial owner of the lands which stood wrongfully in the name of Kenneth Mainard as trustees; that the oil and gas lease to Shunatona was not executed in Oklahoma by lawful authority; that plaintiff in taking the lease knew of her ownership, or knew or was acquainted with facts sufficient to put it on inquiry; that Magnolia acquired nothing by its purchase of the lease. She prayed that the action be dismissed for want of jurisdiction over her, or, in the alternative, if it be not dismissed, that she have a cancellation of the oil and gas lease and an accounting as to, and recovery of, all proceeds resulting from the drilling of the wells less the actual cost of said drilling and operations.

In reply Magnolia filed a general denial and pleaded various Texas statutes of limitation, also ratification of the lease by Amey Thlocco.

On the question of Amey Thlocco's competency, in its findings the trial court held that although Amey had been adjudicated an incompetent person by the proper court of Oklahoma, the state of her domicile, which court had placed both her person and her estate in guardianship, nevertheless the judgment of the Oklahoma court was not binding on the Federal district court in applying the Texas statutes of limitation and adverse possession. It further held

that she was of sound mind at the time of the excution of the lease and had been continuously of sound mind down to the present time.

The trial court refused to consider or value evidence offered relative to the question of the restrictions on Amey's funds or the restrictions on lands received by her in lieu of these funds. The court took the position that petitioners were seeking to place an Oklahoma state restriction, not a Federal restriction on these lands and that the laws of the State of Texas would not recognize such. (R. 227, 228)

The trial court held for the plaintiff, Magnolia Petroleum Company,on all points and based its decision on powers of the trustee (Mainard) to transfer Texas property according to the terms of Section 7425a, Vernon's Annotated Civil Statutes of Texas (Appendix, *infra*, p. 65). The trial court held in substance that Mainard held title to the Texas property as trustee through a deed which did not disclose the names of the beneficiary and that a purchaser (Magnolia) could deal with the trustee with full reliance on his power to act by virtue of said Section 7425a supra. It also held that under the fact situation here there was neither a resulting or a contructive trust but an express trust which enabled the trustee to deal freely with such lands.

The Fifth Circuit Court upheld the decision of the trial court. It did not discuss or analyze any of the Congressional

Acts or Federal statutes hereinafter set forth relative to the protection of Indian wards of the United States Government, nor did it cite or analyze any decision of any state or federal court interpreting these Acts. On this point it said:

> "* * * But if we should assume that the land was restricted, nothing in the federal statutes nor in the decisions construing them gives warrant for appellant's claim that they operate to remove land in Texas from the operation of Texas laws, and particularly nothing in them operates as a barrier to the running of the Texas Statutes of Limitation." (R. 848)

Reasons for Granting the Writ

There are a number of far-reaching and important questions involved in this appeal. They are:

1. The question of restricting alienation on lands acquired by or for full blood restricted Oklahoma Indians in states other than Oklahoma and the method of transfer thereof. This particular question should be passed upon and settled directly by the Supreme Court of the United States.

The trial court erroneously found that the lands in question were not and never had been restricted. The Circuit Court's opinion affirmed this finding.

Amey Thlocco acquired the lands in question as the equivalent of and in lieu of restricted funds regardless

of the method of transfer from the Fidelity Union Casualty Company. The only money Amey Thlocco ever had was (a) from her own allotment, and (b) from the allotment of her father, Teewee, full blood restricted Seminole Indian, and in either case the money would have been restricted since the funds came from full blood restricted lands.[1]

These funds were under the supervision of the Secretary of the Interior, which made them restricted funds under the terms of the Act of Congress of January 27,

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[1] "Where property in its original state and form has once been impressed with a trust, no change of that state and form can divest it of its trust character, so long as it remains capable of clear identification.

"Where land was purchased for a full-blood Choctaw Indian from proceeds of his original restricted allotment, he was an 'allottee of such lands' within statute imposing qualified restrictions on interest in restricted land acquired by inheritance or devise from allottee. Act May 27, 1908, Sec. 1, 35 Stat. 312; Act May 27, 1908, Sec. 9, 35 Stat. 315, as amended by Act April 12, 1926, Sec. 1, 44 State, 239; Act May 10, 1928, Secs. 1, 2, 45 Stat. 495.

"If statute regarding qualified restrictions on Indian land was ambiguous, the doubt was to be resolved in favor of the Indian. Act. May 27, 1908, Sec. 9, 35 Stat. 315, as amended by Act April 12, 1926, Sec. 1, 44 Stat. 239."

Ward v. **United States** (10 Cir.), 139 Fed. (2) 79, 80.

"Where land was acquired with funds derived from restricted allotment of Indian and was held under the same trust, it constituted 'lands allotted to members of the Five Civilized Tribes' within statute creating restrictions. Act May 10, 1928, Sec. 1, 45 Stat. 495."

United States v. **Williams**, (10 Cir.) 139 Fed. (2) 83.

Murray v. **Ned**, (10 Cir.) 135 Fed. (2) 407; **United States** v. **Grisso**, (10 Cir.) 138 Fed. (2) 996; **Clinkenbeard** v. **United States**, (10 Cir.) 109 Fed. (2) 730.

1933, sec. 8, 47 Stat. 777. (R. 227, 535)[2] The courts have universally held, as applied to funds of restricted Indians, that no change in the form of the property divests it of the trust and its restricted character.[3]

2. The holding of the lower courts, to the effect that nothing in the Federal statutes or the decisions interpreting them removes restricted Indian lands from the operation of local state statutes of limitation and adverse possession, is contrary to numerous decisions of this court and other circuit courts.

This question has been passed upon as federal question squarely and in contrary manner by state courts, other circuit courts, and by the Supreme Court of the United States in the following cases:

Baldridge v. *Caulk*, (1925) 237 P. 453, 110 Okl. 185;

In re Baptiste's Will, (1925) 237 P. 854, 110 Okl. 267;

Burgess v. *Bosen*, 31 Fed. Sup. (2) 352;

United States v. *Rickert*, 188 U. S. 432, 438, 47 L. Ed. 532, 536, 23 Sup. Ct. Rep. 478;

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[2] See Sec. 6 of Act of May 27, 1908; Act of July 14, 1918; Sec. 8, Act of January 27, 1933. (Appendix, infra, p. 61).

[3] U. S. v. Gray 201 Fed. 290; U. S. v. Thurston County, County, Nebraska, et al, 143 Fed. 287; U. S. v. Fitzgerald, 201 Fed. 295; 2 Perry on Trusts, 835, 836, 837; Three Foretops v. Ross, County Treasurer, 235 Pac. 334; U. S. v. Pearson, County Treasurer, 231 Fed. 270; also cases cited in U. S. v. Pearson County Treasurer, supra, which are followed in that opinion; see also Chapter 10, p. 195, Handbook of Federal Indian Laws, by Felix S. Cohen, foreword by Harold L. Ickes, introduction by Nathan R. Margold, published by the United States Department of Interior.

Sperry Oil & Gas Co. v. *Chisholm*, 264 U. S. 488, 68 L. Ed. 803, 44 Sup. Ct. Rep. 372;

United States v. *7,405.3 acres of land*, (4 Cir. 97 Fed. (2) 416;

United States v. *Corp, of President, etc.*, (10 Cir.) 101 Fed. (2) 156;

Cravens v. *Amos*, 64 Okl. 71, 166 P. 140;

Bunch v. *Cole*, 263 U. S. 250, 68 L. Ed. 290, 44 Sup. Ct. Rep. 101;

Marchie Tiger v. *Western Invest. Co.*, 221 U. S. 286, 55 L. Ed. 738, 31 Sup. Ct. Rep. 578;

Mullen v. *Pickens*, 250 U. S. 590, 63 L. Ed. 1158, 40 Sup. Ct. Rep. 31;

Brader v. *James*, 246 U. S. 88, 96, 62 L. Ed. 591, 595, 38 Sup. Ct. Rep. 285;

United States v. *Brown*, 8 Fed. (2) 564.

3. The holding of the lower court to the effect that under the fact situation here "it is quite clear that the trust in question here was neither resulting nor constructive but an express trust created for the purpose of enabling Mainard, as trustee, to deal freely with the Texas lands, and that in terms and in fact it is directly within both the purpose and the language of the statute (Texas)" is erroneous.

Amey Thlocco was a full-blood, incompetent Indian, a resident of the State of Oklahoma; she was not sui juris, and was incapable of creating a trust. As to her it was a resulting or constructive trust, if any was created.

137 A. L. R. at page 469;

Studebaker Bros. Mfg. Co. v. *Hunt*, (Tex. Civ. App.) 38 S. W. 1134;

Merriman v. *Russell*, 39 Tex. 278, 284;

Restatement of the Law, Trusts, pp. 5, 6, 1244, 1245, 1249;

Restatement of the Law, Restitution, pp. 642, par. 160 (g);

65 C. J., *Trusts, pp.* 223, 224, 225, 363, 740.

(b) Since the res of the trust was funds belonging to Amey Thlocco and lands in lieu thereof, and at the time the purported trust was created (November 15, 1934) the Act of Congress of January 27, 1933 (Appendix, *infra*, p. 19) was in operation, any attempted trust powers vested in Mainard would have to be approved by the Secretary of the Interior. Robertson, United States Probate Attorney, attempted to protect Amey Thlocco in the manner of taking the deed but his instructions were disregarded. However, only with the approval of the Secretary of the Interior could such a trust have been created. Act of January 27, 1933, supra. That approval was not obtained.

4. The holding of the lower courts was erroneous in that it permitted a collateral attack in a Federal court of Texas on a valid existing judgment in Oklahoma.

There is no Federal statutory provision for the appointment of a guardian in a Federal court. Therefore, the appointment of a guardian in an Oklahoma county court was res adjudicata as to a Federal district court, particularly since the question of Amey Thlocco's incompetency had never been raised in a county or a district court of the State of Texas. This precluded a Federal trial judge from striking down the judgment of the Oklahoma county court or making an original finding of fact contrary to that judgment pleaded and proved.

United States v. *Merrell*, (10 Cir.) 140 Fed, (2) 602;[4]

Poorman v. *Carlton*, (Kansas) 253 Pac. 424[5]

Act of May 26, 1790, Title 28, Ch. 17, U. S. C. A. Sec. 2, Art. 3, United States Constitution;

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[4] **United States** v. **Merrell**, 140 Fed. (2) 602: "A state court having first exercised jurisdiction, its judgment is exclusive of federal jurisdiction and not subject to collateral attack unless the absence of jurisdiction over the subject matter, or lack of power to render judgment, affirmatively appears from the face of the proceedings. * * * A county court's adjudication appointing administrators for the estate of decedent, which judgment was not void on its face, was not subject to collateral attack in a federal court exercising concurrent jurisdiction."

[5] **Poorman** v. **Carlton et al.**, 253 Pac. 424 (Kan.): "Under the provision of the Constitution of the United States, which requires that full faith and credit be given to the judicial proceedings of every other state, a judgment of a court of competent jurisdiction in Oklahoma, declaring an Osage Indian an incompetent person and appointing a guardian for his estate, establishes the status of the Indian which follows him into this state."

Ellis v. *Davis*, 109 U. S. 485, 3 Sup. Ct. Rep. 327, 27 L. Ed. 1006;

Sutton v. *English*, 246 U. S. 199, 38 Sup. Ct. Rep. 254, 62 L. Ed. 664;

O'Callaghan v. *O'Brien*, 199 U. S. 89, 25 Sup. Ct. Rep. 727, 50 L. Ed. 101.

5. Eliminating the question of restrictions and all Federal questions, the decision of the trial court was erroneous because it divested an incompetent citizen of Oklahoma of property in Texas without ancillary guardianship proceedings as provided by the Texas statutes. Articles 4285-4286, Revised Civil Statutes, Texas. (Appendix, *infra*, p. 64).

Amey Thlocco, a resident of the State of Oklahoma all her life, had been duly adjudicated an incompetent in Oklahoma and full faith and credit should have been given the findings of the Oklahoma court on this point. This is particularly true since the local and public policy of the State of Oklahoma and of the State of Texas is to the effect than an incompetent can only be divested of property by a gurdianship sale.

Redmon v. *Leach*, 130 S. W. (2) 873 (*Writ of error dismissed by Supreme Court with notation "Correct judgment"*);

Martinez et al v. *Guiterrez, et al.*, 66 S. W. (2) 678;

Wilkinson v. *Owens, et al.*, 72 S. W. (2) 330.

The holding of the trial court so far departs from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this court's power of supervision.

6. The decision of the lower courts is erroneous in its interpretation and application of Section 7425a, Revised Civil Statutes of Texas, (Appendix, *infra*, p. 65) because said statute contemplated a legal trust created by one sui juris. The trust here was neither a legal trust nor one created by a person sui juris. Amey Thlocco, a restricted full blood Indian, legally adjudged an incompetent person, could not and did not create the trust in question and the decision erroneously holds that here was created an express trust. Robertson, the United States Probate Attorney, testified (R. 228, 229) that Amey was not consulted when the deed to Mainard was executed, had no part in the creation of the trust, did not have the mental capacity to know the meaning of a trust and would not have known how to create a trust had she been consulted.

If a trust resulted from the acts of other parties, Mainard could only have been a resulting or constructive trustee, in which event the Texas laws of notice would not apply and the case of Gulf Production Company v. Con-

tinental Oil Company, 132 S. W. (2) 553, 164 S. W. (2) 488 has no application here.[6]

Cage v. Eastburn & Company, 23 S. W. (2) 65;

McWhorter v. *Oliver*, 2 S. W. (2) 281;

Woodall v. *Adams*, 7 S. W. (2) 922;

Grand Court of Order of Calanthe of Texas v. *Ebeling*, 129 S. W. (2) 715;

Rodriguez v. *Vellejo*, 157 S. W. (2) 172.

7. The opinion of the trial court as affirmed by the Fifth Circuit Court was erroneous in its application of Section 7425a, Revised Civil Statutes of Texas (Appendix, *infra*, p. 65), to the fact situation here, in that said section was never intended to permit a trustee to transfer lands of an incompetent who was incapable of creating a trust. Such a construction of the Act would create a means for gross fraud in depriving innocent persons of their property as illustrated here. The decision in applying said Section 7425a is to thwart the public

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[6] The Texas Constitution requires the Texas Statutes to be codified under separate and distinct titles. All statutes governing the relations between guardians and wards are contained in Title 69 of the Texas Code entitled "Guardian and Ward." Article 7425a is incorporated into Title 125a captioned "Trustees". No Texas court has ever held that Article 7425a applies to estates in wardship. Manifestly, Article 7425a does not apply to Trustees ex maleficio. Moreover, the Supreme Court of Texas has recently held it **Neblett v. Valentino**, 92 S. W. (2) 432, that one who purports to act as a Trustee for a ward assumes the statutory obligations of a guardian. Finally, the Texas Courts have repeatedly held that trusts created to thwart the public policy of the State as defined in the Statutes are absolutely void and unenforceable. **McCamey v. Hollister Oil Company, et al.**, 241 S. W. 689.

policy of Texas by permitting the transfer of an incompetent's property without a proper guardianship sale.[7] This is contrary to the local and state policy. The case relied upon in the decision, *Gulf Production Company* v. *Continental Oil Company, supra,* is not applicable.

American Surety Co. of New York v. *Fitzgerald,* 36 S. W. (2) 1104;

Neblett v. Valentino, 92 S. W. (2) 432;

Wilkinson v. Owens, et al., 72 S. W. (2) 330;

Kelsey v. *Trisler, et al.,* 74 S. W. 64;

Jones et al v. *Sun Oil Company, et al.,* 153 S. W. (2) 571;

Gulf Production Co. v. *Oldham et al.,* 274 S. W. 238;

Pure Oil Co. v. *Clark,* 56 S. W. (2) 852;

Texas & N. O. Ry. Co. v. *Jones,* 103 S. W. (2) 1043.

8. The decision of the trial court is erroneous in holding that under the fact situation here an express was created. If the court had correctly defined the purported trust as a resulting or constructive trust, then Magnolia could not have been an innocent purchaser under the decisions of the Texas state courts and Federal

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[7] Chapter 13, Title 69, Articles 4285 ss, Texas Statutes, permit duly appointed foreign guardians to qualify in Texas. If the foreign guardian does not choose to take advantage of Article 4285, such foreign guardian, or others interested may procure appointment of an ancillary guardian of the Texas estate of the ward, perforce of Article 4132.

courts, and the Circuit Court's opinion should have reversed the trial court. The following Texas cases have applied Section 7425a, *supra*, to fact situations involving resulting or constructive trusts:

McWhorter v. *Oliver*, *supra;*

Woodall v. *Adams*, *supra;*

Cage v. *Eastburn & Company*, *supra;*

Grand Court of Order of Calanthe of Texas v. *Ebeling*, *supra;*

Rodriguez v. *Vellejo*, *supra.*

The following cases lay down the rule that one who purchases trust property with actual or constructive notice of the trust is held to the same liability as the original trustee and as the statutes of limitation will not run in favor of a trustee they will not run in favor of a purchaser:

Houston Oil Company v. *Hayden, et al.*, 135 S. W. 1142;

Worst v. *Sgitcovich*, 42 S. W. 72;

Briggs v. *McBride*, 190 S. W. 1123;

Lewis v. *Castleman*, 2 Tex. 422;

Humble Oil & Refining Co. v. *Campbell*, 69 Fed. (2) 667;

Baker v. *Schofield*, 243 U. S. 114, 61 L. Ed. 626.

9. The trial court found that Amey Thlocco by her acts ratified the oil and gas lease in question. The Circuit Court merely stated that it was not necessary for that appellate court to discuss or consider this question for "we think it plain that whether this contention be sound or unsound, it is quite clear that the judgment must be affirmed on the showing and findings made of record and limitation title in plaintiff". The trial court's decision as affirmed by the Circuit Court was erroneous because an incompetent full blood Indian could not have ratified the oil and gas lease on the lands in question whether the lands were restricted or unrestricted, and no personal acts of hers would have worked an estoppel.

19 Am. Jur. 637;

Vol 4, Words and Phrases, Second Series, p. 127;

Ewert v. *Bluejacket*, (8 Cir.) 259 U. S. 128, 66 L. Ed. 858;

Kendall v. *Ewert*, (8 Cir.) 259 U. S. 137, 66 L. Ed. 862;

Whitchurch v. *Crawford*, (10 Cir.) 92 Fed. (2) 249;

Wilkinson v. *Owen, et al.*, 72 S. W. (2) 330.

The trial court in its findings and the Circuit Court in its affirming opinion refer to suits brought by Amey Thlocco in the Federal court in Oklahoma for the pur-

pose of making Mainard account to her as trustee, resign as guardian, and to make transfers to her on the Texas lands. In one of these suits other defendants than Mainard (but not Magnolia) were named. These cases were designed to unhorse Mainard who proved to be faithless to his trust as guardian and as trustee. Compromise settlements were entered into in these cases in the Oklahoma Federal court (R. 171, 180). The stipulation of settlement (R. 180) contained a clause[8] protecting Amey in any other suit that might arise. Likewise the Federal district court in Oklahoma entered a savings clause[9] to protect Amey (R. 209), which saving clauses were wholly ignored by the trial court and the Circuit Court.

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[8] "That neither the approval and acceptance of this offer of compromise, nor the accounting to be had as herein provided, shall in anywise prevent, prejudice or estop the said Amey Thlocco, by guardian or next friend, or the Government of the United States in her behalf, from instituting or maintaing any action, suit or proceeding to recover any property, funds or interest therein lawfully belonging to her other than the above described 65-acre mineral intrest conveyed to J. B. Terry as aforesaid and the decree to be entered herein shall expressly so provide." (R. 180)

[9] "It is Further Ordered that the judgment of this Court shall in no respect affect the rights of the said Amey Thlocco, an incompetent, her present guardian, and guardian ad litem, or the United States of America from maintaining or instituting any other suit, or suits, affecting the estate or properties of the said Amey Thlocco, an incompetent, regardless of where said estate or properties may be situated; and that the judgment of this Court shall in no respect be construed as res adjudicata." (R. 209)

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI

In view of the complicated fact situation herein, with its many angles and ramifications and the many state and legal question involved, it is impossible for us to present this petition and brief in as short form as we desire. As provided in Rule 38, Revised Rules of the Supreme Court of the United States, as amended, subsection 2, we are including our supporting brief in the petition, in the interest of brevity and to save repetition.

The petition contains (a) *Opinion Below*, (b) *Jurisdiction*, (c) *Questions Presented*, (d) *Statement*, (e) *Reasons for Granting the Writ*. The brief to follow will contain (a) *Statutes Involved*, (b) *Summary of Argument*, (c) *Argument*, (d) *Conclusion*, (e) *Appendix*.

Statutes Involved

The pertinent statutes are set forth in the Appendix, *infra*, pp. 49 s.s..

Summary of Argument

The effect of Federal Acts. Amey Thlocco was a full blood enrolled Seminole Indian. She was restricted by reason of her status, (a) quantum of blood, and (b) further declared "mentally incompetent" to look after her business affairs by courts in Oklahoma having jurisdic-

tion over her person and estate. (See Congressional Acts, Appendix, *infra*, pp. 48 s.s.).

Her moneys came to her from restricted funds from (a) her full blood Indian father's allotment, and (b) her own allotment. Through defalcation of these funds by her guardian the lands in question came to her in lieu of these funds. The change in the form of the property did not divest it of its trust character and the substitute takes the nature of the original trust and is still restricted. *Three Foretops* v. *Ross, County Treasurer*, 235 P. 334; *United States* v. *Pearson, County Treasurer*, 231 Fed. 270; *Ward* v. *United States*, (10 Cir.) 139 Fed. (2) 79; *United States* v. *Williams*, (10 Cir.) 139 Fed. (2) 83.

It makes no difference in what state her property is located. Since the restriction is a personal one and the restrictions against alienation run against her as an Indian as well as against her lands, and the restrictions were created by Congressional Acts, Texas state laws could not operate to remove such restrictions. *Murray* v. *Ned*, 135 Fed. (2) 135. Wherever situated the land, or an interest in the land should only be sold or conveyed by approval of the proper court in Oklahoma or by the Secretary of Interior, or both. *United* v. *Brown*, 8 Fed. (2) 564; Here the Magnolia claims a valid legal trust was created by Amey Thlocco with Kenneth Mainard as trustee. At the time of the execution of the deed in question the Act of January 27, 1933 (Appendix, *infra*, pp. 57-62), authorizing the creation of a trust of property

of restricted Indians only through approval of the Secretary of the Interior, was in force. Since this purported trust was not approved by the Secretary of the Interior it was wholly void.

The opinion violated the full faith and credit clause of the Constitution of the United States, Section I of Article 4; also Rule 17 of Federal Rules of Civil Procedure; in that it refused to accept Amey Thlocco's status as an incompetent as declared by proper Oklahoma courts.

Federal courts which have no probate authority cannot pass upon the status of competency of one already adjudicated an incompetent by a proper court of the state of her residence. (See citations under Section 4, Reasons for Granting the Writ.)

It is against the public policy of the State of Texas to divest a duly adjudicated incompetent citizen of another state of property in Texas without ancillary guardianship proceedings as provided by the Texas statutes. Articles, 4285, 4286, Revised Statutes of Texas. (Appendix, *infra*, p. 64).

Article 7425a, Revised Statutes of Texas, (Appendix, *infra*, p. 65) is a statute passed by the Texas Legislature, changing the common law rule of notice and of innocent purchaser. It is so indexed and codified and was not intended to repeal or modify the Texas statutes applying to Guardian and Ward. (See citations under Section 4, Reasons for Granting the Writ.)

Article 7425a *supra*, was erroneously applied to the fact situation here. The result of the opinion is to wipe out resulting and constructive trusts in Texas so far as the laws of notice are concerned. This was not the intent of the statute and is contrary to Texas decisions. Rodriguez v. Vallejo, 157 S. W. (2) 172.[10] The purported trust here was not an express trust. If not an express trust, then the Magnolia could not have been an innocent purchaser without notice, in which event the decision would have been in favor of Amey Thlocco as admitted in the Circuit Court's opinion. (See definitions of express, resulting and constructive trusts, cited under Section 8, Reasons for Granting the Writ.)

The Magnolia was not an innocent purchaser since it had actual notice of Amey's ownership of the res through its lease buyer, Dunaway, in Wewoka, Oklahoma, and also had notice of such facts which would put a reasonably prudent person on notice and which facts upon inquiry would have disclosed Amey's ownership.

Nor was it an innocent purchaser as found in the opinion under the holdings of the Texas decisions in *Houston Oil Company* v. *Hayden et al.*, 135 S. W. 1142, and *Humble Oil & Refining Co.* v. *Campbell*, 69 Fed. (2) 667.

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[10] **Rodriguez v. Vallejo, 157 S. W. (2) 172, holds: "Appellants invoke the provisions of Art. 7425a, Vernon's Ann. Civ. St. as follows: (statute omitted) * * * (2) We hold that Art. 7425a has no application to transfer by trustees of a title acquired by operation of law through a resulting trust, where, as in this case, the vendee takes with notice of the trust."**

The lease was void in its inception in Oklahoma. The trial court properly found that the purported sale to Shunatona did not comply with the pertinent Oklahoma statutes (Appendix, *infra*, p. 66) nor was it approved by the Secretary of the Interior. Shunatona knew all the facts of Amey's ownership; the lease was unenforceable and void in his hands. He could not validate it by sending it across Red River into Texas and trasferring it to one claiming to be an innocent purchaser.

An Indian by reason of her incompetent status, (a) enrolled full blood, (b) adjudicated mental incompetency, could not ratify or validate a void lease merely by accepting from a faithless guardian royalty funds received from the lease by the guardian and commingled with other funds before she received them. (See citations under Section 9, Reasons for Granting the Writ.) Moreover, the Federal court judgments in Oklahoma contain savings clauses in Ameys' favor and could not be pleaded as a bar against her, particularly since the Magnolia was not a party to those suits.

Argument

We think it unfortunate that a legal controversy involving property and the status of a full blood restricted Indian should have arisen in a state where so far as we can find in checking the Federal Reports no similar or remotely kindred question has been presented before. Oklahoma has within its borders many tribes of Indians and

its Supreme Court and the Federal courts, district and circuit, functioning therein have rendered hundreds of decisions to which the lawyers of this nation turn when they search for controlling decisions on Indian land questions. None of these cases arising in Oklahoma, involving treaties, Congressional acts, or restrictions, are analyzed in the Circuit Court's opinion here.

This in a small measure may account for the confusion that seemed to exist in the trial judge's mind when appellants sought to make proof of Amey Thlocco's restricted status under Federal Acts. He inquired if it was sought "to put this Oklahoma restriction" on the lands in question; then rendered his decision in three words: "No can do." (R. 227, 228)

The Circuit Court's opinion show, in our opinion, that it was content to accept the findings of fact and conclusions of law of the trial judge without an examination of the record. It made no attempt to analyze, distinguish or apply pertinent Federal statutes or decisions. Certain Acts are cited in the foot-note in the opinion (See Appendix, *infra*, pp. 49 s.s.). We submit that instead of constituting a proper basis for the Circuit Court's conclusion, these Acts in reality support the contentions of appellant, Amey Thlocco, as to her full blood restricted status.

The opinion proper cited only four cases, none of which, we think, are applicable to the question involved. One of

these was a Texas Supreme Court opinion and three were from the Oklahoma Supreme Court.

The Texas case (which incidentally was the second opinion by that court on the same subject and state of facts and reversed the former decision) has no application because of the court's error in its definition of the purported trust. This is the case of *Gulf Production Company et al* v. *Continental Oil Company, et al.*, 164 S. W. (2) 488. If this case has any application, then the opinion could only be correct if the purported trust were an express trust.

The case of *Oklahoma Natural Gas Corp.* v. *Lay*, 51 P. (2) 580, (Okla.), has no application herein because it involved the rescission on a contract of an aged person who was not under guardianship and no guardianship question was involved.

The second Oklahoma case referred to is *In re Nitey's Estate*, 52 P. (2) 215. It has no application to the fact situation here because it involved the validity of a will made by a person under guardianship where the facts showed that the will was (a) equitable, (b) made after safeguards had been thrown around it and it had been approved by the Federal officials charged with protecting Indians.

Mere reference is made to the third Oklahoma case, *Shelby* v. *Farve*, 126 P. 764, and we submit that an examination of this case shows that the reasoning there-

under and the results of the opinion bolster petitioners' contention and weaken the position of Magnolia.

The Circuit Court opinion says that the Texas statustes of limitation may be applied as a bar to Amey's recovery because she has not been adjudicated to be a person of unsound mind in the State of Texas. It then implies that although Amey Thlocco was mentally incompetent as found by the Oklahoma courts, she was not a "person of unsound mind". The opinion then refers to Section 15, Title 16, Oklahoma Statutes, for a definition of incompetency. The definition cited is a definition under the Chapter on Contracts and who may contract, and not a definition under Guardian and Ward. The applicable sections under Guardian and Ward, Oklahoma Statutes, provide that a guardian may be appointed for a person who is "a minor or of unsound mind" (Guardian and Ward, Title 30, Section 8) or of "a person incapable of taking care of himself or managing his property" (Guardian and Ward, Title 58, Section 852).

Mental incompetency to manage an estate and unsound mind are synonymous insofar as capacity to do business. Ballentine's Law Dictionary.[11] On this point the opinion

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[11] In illuminating language United States District Judge (now United States Circuit Judge) Robert L. Williams in March, 1933, described Amey Thlocco in an opinion in another case (Kiker v. United States, 63 Fed. (2) 957 (8 Cir.) where she had been swindled, thus: "I find that Amey Thlocco was incompetent, and incapable of understanding and appreciating the effect of the transaction. * * * But we cannot avoid the conclusion that Amey Thlocco, true to the common disposition of her race, is grossly careless of her interests and improvident in affairs of a business nature, and Kiker must have known that he was taking

wholly ignores the applicable Oklahoma statutes and refuses to recognize the adjudication of the Oklahoma courts on this point, striking down the Oklahoma judgments in a collateral proceedings in a Texas Federal district court which has no probate powers.

Since the lands involved came to Amey in lieu of funds (R. 227, 535) received by her from restricted properties, the lands were and are restricted in her hands. She could not today, although these lands are situated in Texas, execute a valid conveyance on same except through the approval of the county court in Oklahoma having jurisdiction over her estate, or of the Secretary of the Interior, or of both. Should she die today possessed of these lands her full blood son and daughter could not transfer these lands inherited from her except by conveyance properly approved. This because of the Congressional Acts. The fact that the lands happen to be located in the state of Texas instead of Oklahoma makes no difference. Amey has a personal restriction against her because of her status. Murray v. Ned, *supra*. Any Acts passed by Congress affecting

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advantage of that weakness. * * * It was exhibited by Amey as soon as the $15,000 came into her hands. The royalties during Teewee's life were paid to the Superintendent of the Five Civilized Tribes, and that was continued after his death. She was willing to make the sacrifice, whatever it might be when measured in a way that no appeal to her, for the primitive thrill of buying whatever she wanted and spending without restraint for awhile. She already had an automoble, but as soon as she got the $15,000 under her control she bought two or three more, furnished her half-brother with money to buy one, and loaned some of it to a friend or friends. Kiker must have known of this weakness, and he took advantage of it. That is a species of fraud to the keen sense of a Chancellor who administers the functions of a Court of conscience."

the status and properties of a full blood Indian are effective as to properties of these Indians in any state in which such properties happen to be located. This for the fundamental reason that the Indians are wards of the United States Government and not of the respective states.

Prior to the passage of the Act of Congress of January 27, 1933 (Appendix, *infra*, pp. 49 s.s.) unscrupulous persons sought out Indians who had considerable funds on hands or income from oil properties and would procure from them agreements making these parties trustees. The unfaithful trustees would then make fake purchases of properties from friends at exorbitant prices and by divers methods defrauded their wards. Congress then passed the 1933 Act to stop this nefarious practice. This Act was in effect when the deed to the property in question to Mainard as trustee was executed in 1934. In making this deed to the purported trustee the terms of the Act were not complied with and the trust was void in Mainard's hands.

Section 1 of the 1933 Act provides "that all funds and other securities now held by, or which may hereafter come under the supervision of, the Secretary of the Interior * * * are hereby declared to be restricted, and shall remain subject to the jurisdiction of said Secretary until April 26, 1956." This Act does not say that it applies only to funds or properties so long as they are in Oklahoma. Suppose, for example, an Oklahoma restricted In-

dian had $50,000 of restricted funds which were deposited in a Dallas, Texas or a Kansas City, Missouri bank and that later a portion of these funds were invested in lands in one of these states. These lands would be restricted under the provisions of this 1933 Act the same as the funds were restricted. This regardless of the state in which the lands were located.

In the case at bar no attempt was made to follow the terms of this Act in the creation of a trust for Amey Thlocco. The purported trust was therefore void and the judgment of the trial court as affirmed by the Circuit Court was erroneous.

The Texas Federal district court had no probate authority to appoint a guardian or to pass upon the status of competency of one already adjudicated incompetent by a proper court of the state of her residence. Nor did it have the right to set aside these adjudications in a collateral proceedings. In so doing the Circuit Court's opinion at bar now holds that neither it nor the Federal district court in Texas is under any constitutional duty to accord any faith or credit to the judgment of the Oklahoma courts. This is contrary to many opinions of the Supreme Court of the United States and particularly *Strader* v. *Graham*, 10 How. 82, 93, 13 L. Ed. 337; *Ellis* v- *Davis*, supra; *Merrill* v. *United States*, 140 Fed. (2) 603 (10th Cir.), and *Poorman* v. *Carlton*, 253 Pac. 424.

Moreover, since Amey Thlocco had never resided in any state except Oklahoma this ruling of the Texas federal courts is an usurpation of judicial power expressly forbidden by Section I, Article IV, Constitution of the United States, and Section 28, U. S. C. A. 687, enacted May 26, 1970

An incompetent citizen of Oklahoma could only be divested of her property in Texas as provided by the Texas Statutes, Articles 4285 ss. (Appendix, *infra*, pp. 64) *Neal* v. *Holt*, 69 S. W. (2) 603; *Redmon* v. *Leach*, supra; *Martinez et al.* v. *Gutierrez, et al., supra; Wilkinson* v. *Owens, et al. supra; American Surety Co. of New York* v. *Fitzgerald, supra; Neblett* v. *Valentino, supra; Kelsey* v. *Trisler et al., supra*; *Jones et al.* v. *Sun Oil Company, et al., supra; Gulf Production Co.* v. *Oldham et al., supra; Pure Oil Co.* v. *Clark, supra; Texas & N. O. Ry. Co.* v. *Jones, supra.*

No Texas court has ever held that Section 7425a, Revised Statutes of Texas, applies to a fact situation such as we have here. In the one case relied upon (*Gulf Production Co.* v. *Continental Oil Co., supra*) all parties involved were adults; none were incompetent, none had nonresident guardians; and none of the parties were full blood restricted Indians. That case went off on the question of notice. The opinion emphasized that the record did not reveal any conduct of the defendant in error inconsistent with the definition of "innocent purchaser"

as defined in *Pomeroy on Equity*, Sec. 1048, and followed in *Houston Oil Company of Texas* v. *Hayden*, *supra*. Further, the opinion there is conclusive that the defendants in error acquitted themselves of the burden imposed upon them by Article 6627, Revised Statutes of Texas (Appendix, *infra*, p. 65)

Under the fact situation here Magnolia had both actual and constructive notice. Moreover, Article 7425a, RCS of Texas, could only apply to an express trust which petitioners contend did not exist here. For definitions of express, resulting and constructive trusts see: *Restatement of the Law, Trusts*, pp. 5 & 6; *Restatement of the Law, Restitution*, p. 642; 65 C. U. "*Trusts*", pp. 223, 224, 225; *Testerman* v. *Burt*, 289 P. 315, 143 Okl. 220; *Rollow* v. *Taylor*, 104 Okl. 275, 231 P. 224; *Restatement of the Law, Trusts*, pp. 1244, 1245, 1249, *Restatement of the Law, Restitution*, par. 160, (g).

Magnolia was not and could not have been an innocent purchaser as declared by the opinion: (1) It had actual notice through its district agent and lease purchaser, Dunaway, who knew the facts prior to the purported purchase of the lease by Shunatona; (2) it had notice of facts which would put a reasonably intelligent person upon inquiry, which, upon investigation, would have revealed the true situation.

These facts were (a) the word "trustee" in the deed, which showed that the land were owned by some cestui que

for whom Mainard pretended to act; (b) the immediate offer of this trustee to resell an unrecorded oil and gas lease for ten times the consideration shown in the face of the original lease which he had just received (presumptively only) from Shunatona, and his possession of an assignment of the lease executed by Shunatona with the name of the assignee left blank; (c) the fact that Magnolia had a direct telephone line from its office in Dallas, Texas to Dunaway's office in Wewoka, Oklahoma and could have ascertained the facts in a few minutes time; (d) Magnolia's examining attorney made lengthy requirements after starting to examine the abstracts of title the same day of the purchase (R. 387), but directed no inquiry as to (1) parties in possession of the lands, (2) the true cestui que trust or the terms of the trust made by the cestui que, or (3) why the trustee was selling an assignment of a lease he had just executed to Shunatona four days previously for ten times the consideration he had purportedly received from Shunatona. Attorney Sutton testified he made none of the inquiries set out because he relied solely on the powers of a trustee under Article 7425a, *supra*.

It is significant to note the following portion of Attorney Sutton's title opinion:

> "V. There accompanied the file an original oil and gas lease, executed by Kenneth Mainard, Trustee, to Bat Shunatona, covering said 130¾ acre tract. The lease is dated February 14, 1936, runs for a

primary term of 10 years, bears the usual ⅛ royalties, provides for an annual rental of $130.00 commencing one year after date, payable to lessor or by deposit to lessor's credit in the Security National Bank, Wewoka, Oklahoma; is written on a Mid-Continent 88 Revised Form, which is a commencement form, contains no unusual provisions, is regularly executed and has not been filed for record. There also accompanied the file an assignment of said lease in blank by Bat Shunatona. * * *" (R. 390)

Article 6627, RCS of Texas, provides:

"All bargains, sales and other conveyances whatever of any lands, tenements, and hereditaments * * * and all deeds of trust and mortgages shall be void as to * * * subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved, and filed with the clerk to be recorded as required by law * * *."

Magnolia was presented with the unrecorded lease and assignment in blank and this company later filed both of these instruments for record after it had issued its check in favor of Shunatona.

The presentation of these instruments, unrecorded, was notice to the Magnolia of any deficiences or weaknesses in Shunatona's lease.

The Magnolia was not an innocent purchaser under the law an dhad constructive notice of Amey Thlocco's ownership of the lands in question.

This goes to the question of whether Mainard's trust was an express trust (if a legal trust existed, which we deny) as found specifically by the opinion, or whether he was a constructive or resulting trustee under the fact situation.

The opinion holds, by inference, that if Mainard's trusteeship is not an express trust the Magnolia would not be an innocent purchaser. With this inference we agree.

It was not an express trust since Amey Thlocco was incapable of creating a trust because (1) the lands came to her in lieu of restricted funds and only the Secretary of the Interior could have created a lawful trust for her (Act of January 27, 1933) Appendix, *infra*, pp. 49 s.s.); (2) she was a person non sui juris and incapable of comprehending the meaning of a trust or its purpose (R. 228, 229); (3) there was no purpose in creating the trust in the manner sought by Ledbetter and contended for by Magnolia except solely to evade the Texas laws of guardianship and ward; this voided the purported trust as violative of the expressed policy of the Texas statutes relative to Guardian and Ward. To say the opinion is correct and that an express trust was created would have the result of abolishing resulting and constructive trusts in Texas and would make all trusts in that state, contrary to the decisions, express trusts. If there was a legal trust here it was a resulting or constructive trust.

One who purchases trust property with actual or constructive notice of the trust steps in the shoes of the original trustee and the statutes of limitation will not run in favor of either. Neither can such purchaser be a bona fide purchaser. *Beach on Trusts and Trustees*, Sec. 670, 137 A. L. R. 469; *Bailey* v. *Glover*, 88 U. S. 342, 22 L. Ed. 636; *Humble Oil & Refining Co.* v. *Campbell*, 69 Fed. (2) 671, 5th CCA; *Anding* v. *Perkins*, 29 Tex. 348; *Hand* v. *Errington*, 238 S. W. 567 (Tex. Civ.); 242 S. W. 722 (Sup. Ct.).

The trial court found that a compromise judgment entered in an Oklahoma Federal court, in accordance with a stipulation of agreement executed by Amey Thlocco by and through her attorneys and approved by the Attorney General of the United States, operates as a ratification of the lease in question by Amey Thlocco, although the Magnolia was not a party to the suit.

Apparently the court was confused since ratification does not arise out o fentry of judgment. The matter here involved is, strictly speaking, not a raitification at all but, if anything, an estoppel by judgment. A ratification arises immediately from an act of the party. 19 Am. Jur., 637; Par. 73, 19 Am. Jur., 709-710; Vol. 4, Words & Phrases, 2d Series, p. 127. The situation here resulted immediately from a decree of the court, participated in by the parties through their consent to its entry.

In a case involving somewhat similar circumstances, *Donahue* v. *Vosper*, 243 U. S. 59, 61 L. Ed. 592, the plaintiff brought suit to declare certain deeds to be void, the defendant by answer set up a consent decree previously entered in a United States Court which he contended was a conveyance operating as estoppel against plaintiff. The Supreme Court of the United States held that no such estoppel could exist for the reason that the decree must be construed by the nature of the suit, and that such a construction was beyond the intention of the decree. In the case at bar the Federal court in Oklahoma in its judgment specifically provided that said judgment should not estop Amey Thlocco from instituting or maintaining any action or suit to recover property belonging to her except the mineral interest involved in that action.

In the case of *Downs* v. *Hubbard*, 123 U. S. 189, 31 L. Ed. 114, the United States Supreme Court held that a decree of a circuit court in another action could not operate as evidence in an action brought by a stranger to that record, and that a stranger to that record could not avail himself of an estoppel by which he was not himself bound.

So, in the case at bar the decree entered in the Federal court in Oklahoma cannot operate as evidence against Amey Thlocco, and since Magnolia is not bound by that decree, it cannot avail itself of that decree as an estoppel against Amey Thlocco.

As to the manner in which the Federal courts have dealt with attempts to obtain ratification of void instruments and settlements with full blood Indians we call the Court's attention to the following cases: *Ewert* v. *Bluejacket*, (8 Cir.) 259 U. S. 128, 66 L. Ed. 858; *Kendall* v. *Ewert*, (8 Cir.) 259 U. S. 137, 66 L. Ed. 862; and *Whitchurch* v. *Crawford*, (10 Cir.) 92 Fed. (2) 249.

The case at bar, Thlocco v. Magnolia Petroleum Co., is now cited in the Federal Reporter system, 141 Fed. (2) 934. The third syllabus reads:

> "Indians. The statutes for the protection of Indians do not remove Texas lands from the operation of Texas laws or prevent the running of Texas statutes of limitations. Act May 27, 1908, 35 Stat. 315, as amended by Act May 10, 1928, 45 Stat. 495; 25 U. S. C. A. par. 409a, 412a; Act Jan. 27, 1933, 47 Stat. 777."

While the opinion itself and not the syllabus may be the law of the case, yet the syllabus here will be considered and quoted as the law by the legal fraternity hereafter.

If Amey Thlocco were sui juris and had not been declared an incompetent in Oklahoma, then it might be argued that the Texas state statutes of limitations and adverse possession would run against her alienation of these lands through a legally appointed trustee, provided these lands were not subject to the bar of restrictions under Congressional Acts. It is our contention that the

Texas statutes cannot be applied against her for two reasons: (1) her full blood restricted status; and (2) her adjudicated incompetent status.

We submit that the Congressional Acts cited and under the three cases, *Ward* v. *United States*, 10 Cir. 139 F. (2) 79, *United States* v. *Williams*, 10 Cir., 139 Fed. (2) 83, and *Murray* v. *Ned*, 10 Cir., 135 Fed (2) 407, make Amey Thlocco's a restricted status under the fact situation here.

If the United States Government were now suing or should hereafter file suit in behalf of Amey Thlocco against Magnolia to recover the lands in question, then the statutes of limitations would not run against the United States Government. There is a long line of cases to this effect: *Schrimpsher* v. *Stockton*, 183 U. S. 290; *Ewert* v. *Bluejacket*, 259 U. S. 129; *Mullen* v. *Simmons*, 234 U. S. 192; *Minnesota* v. *United States*, 305 U. S. 382, and the recent case of *United States* v. *Hellard*, supra.

Since this Court now has before it in this record the same parties litigant, towit, Amey Thlocco and Magnolia Petroleum Company, and has before it the same state of facts that would be adduced in the event the United States Government should hereafter bring suit against Magnolia for the same recovery as prayed for herein, we see no reason why this Court should not at this time grant certiorari and decide this important question.

We desire to call the Court's attention to one other fact, towit: When Congress intended to permit state statutes to affect the rights of Indians, special Acts applying thereto have been passed. For example, as applied to Oklahoma, the Act of April 12, 1926, 44 Stat. 239 (Appendix, *infra*, p. 52) provides that the Oklahoma state statutes of limitations should run against Indian lands. No such special act was ever passed as applied to the statutes of limitations in the State of Texas. Sec. 5, State Courts, pp. 379, 380, 381, Handbook of Federal Indian Law by Felix S. Cohen.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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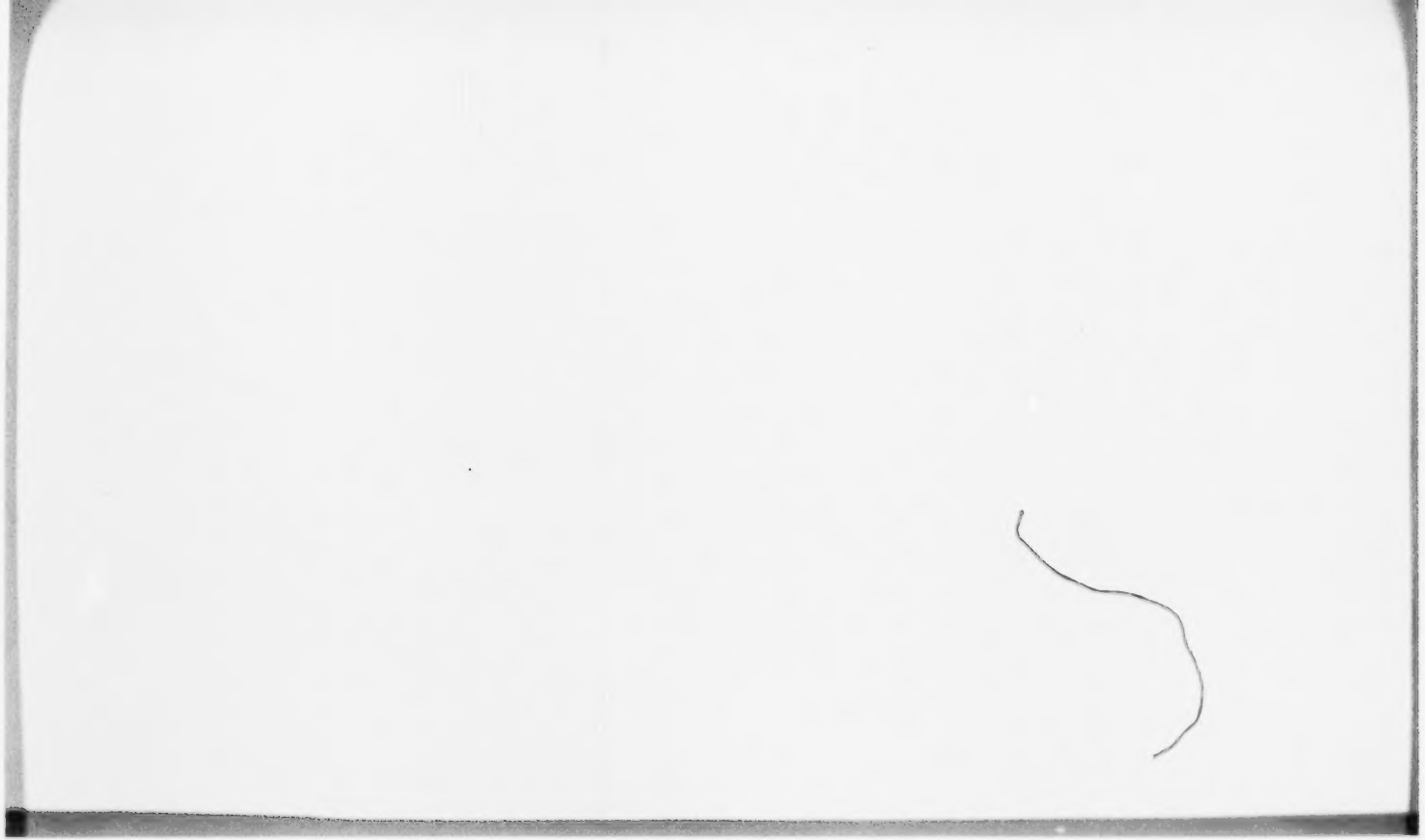

APPENDIX

Section 1 of Article IV, Constitution of the United States, provides:

"Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Articles 924, 925 and 929 of the Act of May 27, 1908 (Sec. 1, 35 Stat. 312), provide:

"Art. 924. STATUS OF ALLOTTED LANDS IN REGARD TO ALIENATION.—

That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, an as mixed-blood Indians having less than half Indian blood including minors, shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half

Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods or three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds from the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from lands by or under any law prior to the passage of this act. No restrictions or alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An Act to grant the right of way through Oklahoma Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

"Art. 925. LEASES OF RESTRICTED LAND. —(Sec. 2). That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent for a period not to exceed five years, without the privilege of renewal: PROVIDED, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secrtary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise, AND PROVIDED FURTHER, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

* * * *

Art 929. EFFECT OF ATTEMPTED ALIENATION OF RESTRICTED LAND.—(Sec. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate,

made before or after approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal or restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void."

The portions of the Act of April 12, 1926, Sec. 1, 44 Stat. 239, applicable here provide:

"An Act to amend section 9 of the Act of May 27, 1908, (Thirty-fifth Statutes at Large, page 312), and for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), entitled "An Act for the removal of restrictions on part of the lands of allottees of the Five Civilized Tribes, and for other purposes, be, and the same is hereby, amended to read as follows:

"'Sec. 9. The death of an allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: PRO-

VIDED, THAT hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator: * * *"

Sec. 2. The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indian, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said State: PROVIDED, That no cause of action which heretofore shall have accrued to any such Indian, shall be barred prior to the expiration of a period of two years from and after the approval of this Act, even though the full statutory

period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from bar of the statutes of limitations.

"Sec. 3. Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes, or the proceeds, issues, rents and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. * * *."

The portions of the Act of May 10, 1928, Sec. 2, 45 State. 495, applicable here provide:

"An Act to extend the period of restriction in lands of certain members of the Five Civilized Tribes, and for other purposes.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the restriction against thealienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: PROVIDED, That the Secretary of the Interior shall have the authority to remove the rstrictions upon the applications of the Indian owners of the land, and may remove such restriction wholly or in part, under such rules and regulations concerning terms of sale, and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

"Sec. 2. That the provisions of section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, Page 312), entitled "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," as amended by section 1 of the Act of April 12, 1926

(Forty-fourth Statutes at Large, Page 239), entitled "An Act to amend section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), and for putting in force, in reference to suits involving Indian Titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes," be, and are hereby, extended and continued in force for a period of twenty-five years from and including April 26, 1931, * * *

"Sec. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from th individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas and other mineral production."

The Act of March 2, 1931, 46 Stat. 1471, as amended by Act of June 30, 1932, 474 Stat. 474; 25 U. S. C. A. 409a, provides:

"409a. *Sale of restricted lands; reinvestment in other restricted lands.* Whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or encumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance. (Mar. 2, 1931, c. 374, 46 Stat. 1471, as amended June 30, 1932, c. 333, 47 Stat. 474.)"

Sections 1, 2, 3, 4, 5 and 6 of the Act of January 27, 1933, Sec. 8, 47 Stat. 777, provide:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Con-*

gress assembled, That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: Provided, that where the entire interest in any tract of restricted and tax-exepmt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law; * * *

"Sec. 2. The Secretary of the Interior be, and he is hereby, authorized to permit, in his discretion and subject to his approval, any Indian of the Five Civilized Tribes, over the age of twenty-one years, having restricted funds or other property subject to the supervision of the Secretary of the Interior,

to create and establish, out of the restricted funds or other property, trusts for the benefits of such Indian, his heirs, or other beneficiaries designated by him, such trusts to be created by contracts or agreements by and between the Indian and incorporated trust companies or such banks as may be authorized by law to act as fiduciaries or trustees: *Provided*, that no trust company or bank shall be trustee in any trust created under this Act which has paid or promised to pay any person other than an officer or employee on the regular pay roll thereof any charge, fee, commission, or remuneration for any service or influence in securing or attempting to secure for it the trusteeship in any trust; *Provided further*, that all trust agreements or contracts made or entered into prior to the date of approval of this Act, and all contracts or agreements made or entered into prior to said date providing for or looking to the creation of such trust or trusts shall be null and void unless such contracts or agreements shall have heretofore been approved by the Secretary of the Interior.

"Sec. 3. The Secretary of the Interior be, and he is hereby, authorized, upon the execution and approval of any trust agreement or contract as herein provided, to transfer, or cause to be transferred, to the trustee, from the individual restricted or trust funds or other restricted property of the respective

Iindian, the funds or property required by the terms of the approved agreement, and the funds or property so transferred shall in each case be held by the trustee subject to the terms and conditions of the trust agreement or contract creating the trust, separate and apart from all assets, investment or trust estates in the hands of said trustee.

"Sec. 4. None of the restrictions upon the funds or property transferred under the terms of any such trust agreement or contract shall be in any manner released during the continuance of the restriction period now or hereafter provided by law, except as provided by the terms of such agreement or contract, and neither the corpus of said trust nor the income derived therefrom shall, during the restriction period provided by law, be subject to alienation, or encumbrance, nor to the satisfaction of any debt or other liability of any beneficiary of such trust during the said restriction period. The trustee shall render an annual accounting to the Secretary of the Interior and to the beneficiary or beneficiaries to whom the income for the preceding year, or any part thereof, was due and payable.

"Sec. 5. Trust agreements or contracts executed and approved as herein provided shall be irrevocable except with the consent and approval of the Secretary of the Interior; *Provided*, That if any trust, trust agreement, or contract be annulled, canceled, or

set aside by order of any court, or otherwise, the principal or corpus of the trust estate, with all accrued and unpaid interest, shall be returned to the Secretary of the Interior as restricted individual Indian property.

"Sec. 6. If, after the creation and approval of any trust, it is found that said trust was procured in violation of any of the provisions of this Act, or that the trustee designated therein has failed or refused to properly perform the duties imposed thereby, in accordance with the terms, provisions and requirement of said trust agreement, it shall be the duty of the Attorney General to institute appropriate proceedings in the Federal courts for the cancellation and annulment of said trust by court decree, and upon decree of annulment and cancellation, which shall be at the cost of the trustee, and after accounting, but without the allowance of any fee, charge, or commission for any services rendered by the trustee, all funds held by the trustee shall be paid to the Secretary of the Interior as restricted funds, and the Federal courts are hereby given exclusive jurisdiction of all actions involving an accounting under any trust created under the provisions of this Act, and all actions to cancel, annul, or set aside any trust entered into pursuant to this Act."

The Act of May 19, 1937, Stat. 188; 25 U. S. C. A. 412a, provides:

> "412a. *Exemption from taxation of lands subject to restrictions against alienation; determination of homestead.*
>
> "All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided*, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; *And provided further*, That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural or grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town or city property, not exceeding in cost $5,000, to be designated as a homestead. (June 20, 1936, c. 622, par. 2, 49 Stat. 1542; May 19, 1937, c. 227, 50 Stat. 188.)"

Rule 17, of the Federal Rules of Civil Procedure provides:

> "*Rule 17. Parties Plaintiff and Defendant; Capacity.*
>
> (a) REAL PARTY IN INTEREST. Every action shall be prosecuted in the name of the real party

in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

(b) CAPACITY TO SUE OR BE SUED. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a cborporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in the common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

(c) INFANTS OR INCOMPETENT PERSONS. When ever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant

or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian *ad litem*. The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

Articles 4285-4289, Revised Civil Statutes of Texas, provide:

"Art. 4285. *Letters of guardianship.*—Where a guardian and his ward are non-residents, such guardian may file in the county court of any county a full and complete transcript from the records of a court of competent jurisdiction where he and his ward reside, showing that he has been appointed and has qualified as guardian of the estate of such ward; which said transcript shall be certified by the clerk of the court in which the proceedings were had, under the seal of such court, if there be one, together with a certificate from the judge, chief justice or presiding magistrate of such court, as the case may be, that the attestation of such transcript is in due form; and upon the filing of such transcript the same may be recorded, and the guardian shall be entitled to receive letters of guardianship of the estate of such minor situated in this State, upon filing a bond with sureties as provided in Article 4141. (Acts 1876, p.

180; G. L. Vol. 8, p. 1011; Acts 1st C. S. 1923, p 13.)

"Art. 4286. *May remove property.*—Upon recovery of the property of the ward, if it be personal property, such guardian may remove the same out of the State, unless such removal would conflict with the tenure of such property, or the terms and limitations under which it is held; and if it be real property, he may obtain an order for the sale of it and remove the proceeds. Such sale shall be made, returned and acted upon by the court as other sales of real estate by a guardian made in accordance with this title."

Article 7425A, Revised Civil Statutes of Texas, provides:

"SECTION 1. Where a trust is created, but is not contained or declared in the conveyance to the trustee, or when a conveyance or transfer is made to a trustee without disclosing the names of the beneficiary, or beneficiaries, the trustee shall be held to have the power to convey or transfer or encumber the title and whenever he shall execute and deliver a conveyance or transfer or encumbrance of such property, as trustee, such conveyance or transfer or encumbrance shall not thereafter be questioned by any one claiming as a beneficiary under such trust or by anyone claiming by, through, or under an undisclosed beneficiary, provided that none of the trust

property in the hands of said trustees shall be liable for personal obligations of said trustee."

Section 16, Title 15, Oklahoma Statutes, provides:

"Persons of unsound mind within the meaning of this chapter (Contracts) are idiots, lunatics, and imbeciles."

Section 8, Title 30, Oklahoma Statutes (Guardian and Ward), provides:

"A guardian of the person or property, or both, of a person residing in this State, who is a minor, or of unsound mind, may be appointed in all cases, other than those named in Section 3326, by the county court, as provided in Chapter 64. (R. L. 1910, par. 3328)"

Section 852, Title 58, Oklahoma Statutes (Probate Procedure), provides:

"If after a full hearing and examination upon such petition, it appears to the judge of the county court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this article specified. (R. L. 1910, par. 6539"

(27)

No. 539

IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT

Case No. 10775

Amey Thlocco, et al.,

vs.

Magnolia Petroleum Company.

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No. 539

IN THE

Supreme Court of the United States

October Term, 1944

AMEY THLOCCO, LORIN RAY, Guardian of the Person and Estate of Amey Thlocco, an Incompetent Person, and OREL BUSBY, Special Guardian Ad Litem,

Petitioners

versus

MAGNOLIA PETROLEUM COMPANY, *Respondent*

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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STATEMENT OF THE CASE

In view of the issues in this case, respondent believes it could be of assistance to the Court by stating the facts in the chronological order in which they came to the knowledge of Magnolia Petroleum Company (hereinafter referred to as Magnolia).

On either the 17th or 18th day of February, 1936 two men, Louis Ledbetter and W. A. Billingsley, residents of the City of Wewoka, Oklahoma, came to the office of Magnolia in Dallas. Ledbetter desired to sell an oil and gas lease owned by himself and his law partner, Bat Shunatona, and he proposed to offer it to Magnolia. He asked Billingsley to accompany him in order to introduce him to C. L. Gladden, Magnolia's Vice President, with whom Billingsley had been acquainted for many years.

The two men presented themselves at Gladden's office and, after the introduction was completed, Ledbetter produced a plat showing the location of the tract covered by the oil and gas lease. The tract consisted of 130-3/4 acres and was located in Titus County, Texas. Ledbetter offered the lease for sale to Gladden. Gladden referred him to Ralph Talley, Superintendent of the Land and Lease Department of the Company, and escorted Ledbetter to Talley's office. Following the introduction in Gladden's office, Billingsley departed and had no further connection with the matter. Ledbetter renewed his offer to sell in his conference with Talley, and was told by Talley to return the following day for an answer. In the meantime, Talley conferred with Company geologists and M. J. McLaughlin, Vice President and head of the Producing Department of the Company, and it was agreed that the lease should be purchased at the consideration named by Ledbetter, which was fifty dollars per acre.

The following day Ledbetter returned and signed a purchase contract. Thereupon, Talley requested that the Com-

pany be furnished with an abstract of title for examination, and the abstract was delivered at that time by Ledbetter. The matter was then referred to W. B. Sutton, one of the Company attorneys, for title examination, and he examined the abstract and prepared a written opinion thereon (R. 387). In the title opinion it was recited that legal title was vested in Kenneth Mainard, Trustee. The lease offered for sale by Ledbetter had been executed by Kenneth Mainard, Trustee, in favor of Bat Shunatona, as lessee. Ledbetter was the law partner of Shunatona and had an interest in the lease. Sutton made a number of requirements on the title, none of which affect the issues here, and within three or four days thereafter Ledbetter furnished the curative matter and a written assignment from Shunatona; and the title was approved. Thereupon, Magnolia issued its check in favor of Bat Shunatona in the amount of the purchase price and delivered it to Ledbetter, Shunatona's agent. In due order of business the check was cashed.

At the time this transaction was consummated none of the representatives of Magnolia Petroleum Company participating in the purchase of the lease was given any information or notice of any character that Amey Thlocco had an interest in the land. The testimony of Gladden (R. 371), of Talley (R. 248), of Haralson, Talley's assistant (R. 259), and of Sutton (R. 773) is direct and positive on the issue that no mention was made in the said negotiations of Amey Thlocco or her beneficial interest in the land. The same is true of the testimony of Ledbetter (R. 755 et seq.) and of Billingsley (R. 692 et seq.).

Sutton testified (R. 773 et seq.) that he found the title vested in the name of Kenneth Mainard, Trustee; that there was nothing in the abstract to show Amey Thlocco's interest in the property and no such information was furnished him from any other source; that the practice of taking title in the name of an individual as "trustee" was a common practice in Texas; that he had seen hundreds of oil and gas leases executed by such trustees; and that at one time the whole East Texas Oil Field was in the name of Joiner, Trustee. He further testified that he was familiar with Article 7425a, Revised Civil Statutes of Texas, [1] dealing with conveyances from trustees, and that he relied upon this statute in approving titles executed by trustees, and, therefore, made no inquiry as to any beneficial interest in the land.

The foregoing facts were the only facts known to Magnolia at the time it purchased its said lease. The evidence described and the facts recited hereinafter cover matters that transpired or became known to Magnolia subsequent to its purchase of the lease.

On October 3, 1936 Magnolia commenced the drilling of a well on this lease. It was completed as a producer on

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[1]Article 7425a is entitled "An Act for the Protection of Those Dealing with Trustees," and Section 1 of the Act reads as follows: "Section 1. Where a trust is created, but is not contained or declared in the conveyance to the trustee, or when a conveyance or transfer is made to a trustee without disclosing the names of the beneficiary, or beneficiaries, the trustee shall be held to have the power to convey or transfer or encumber the title and whenever he shall execute and deliver a conveyance or transfer or encumbrance of such property, as trustee, such conveyance or transfer or encumbrance shall not thereafter be questioned by any one claiming as a beneficiary under such trust or by any one claiming by, through, or under an undisclosed beneficiary, provided that none of the trust property in the hands of said trustee shall be liable for personal obligations of said trustee."

October 26, 1936. Thereafter Magnolia kept one drilling rig running continuously until sixteen wells were drilled (R. 156 and 819). The total cost of drilling and operating the property to December 31, 1942 was $681,002.35. The proceeds of oil produced to said date amounted to $768,-533.88. The net status was $87,531.53 as of said date. Approximately five years had elapsed from the drilling of the first well before Magnolia had its investment returned to it.

Upon obtaining production from the premises Magnolia commenced paying royalties to Kenneth Mainard, Trustee, lessor. A total of $35,070.16 was paid to Kenneth Mainard, Trustee, for royalties accruing up to February 1, 1941, at which time payment was suspended on account of litigation in Oklahoma over the royalty interest.[2] Thereafter, the royalty was impounded until after settlement of the Oklahoma litigation, and during the suspension period up to February 28, 1943, an additional amount of $19,076.42 accrued, and said amount was paid into the registry of the trial court in this case on order of Court.

On April 15, 1941 (more than five years after Magnolia acquired its lease) Honorable Orel Busby, attorney of Ada, Oklahoma, addressed a letter to Earl A. Brown, Magnolia attorney in Dallas, in which Magnolia's title to its oil and gas leasehold was questioned. The letter stated that the writer had filed a suit in Oklahoma attacking the royalty conveyances made by Kenneth Mainard, Trustee, and the

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[2]Kenneth Mainard, Trustee, had executed a certain royalty deed to one J. B. Terry covering an undivided one-half interest in the royalty, and in the Oklahoma action Amey Thlocco was contesting the validity of this deed.

same question involved in that case was also present in Magnolia's ownership of the leasehold. It was asserted that Kenneth Mainard, Trustee, had no individual interest in the land and that he was holding it in trust for Amey Thlocco, who was a wealthy full-blood Indian woman, residing near Wewoka, Oklahoma.

Investigation then developed these facts: Amey Thlocco had been adjudged incompetent to manage her business by the County Court of Seminole County, Oklahoma, on the 5th day of March, 1929, and one Hugh Barham was appointed as her guardian. A large amount of Amey's money came into his hands as such guardian. Of this amount Barham misapplied and embezzled a total of $15,775.40. When this was discovered Barham was removed as guardian, prosecuted, and sent to the penitentiary for this and other crimes. Kenneth Mainard was then appointed as Amey's guardian, and brought suit against Barham and the surety on Barham's guardianship bond, Fidelity Union Insurance Company. Judgment against the insurance company was obtained on October 5, 1933 in the amount of $15,775.40. The insurance company negotiated for a settlement, and an agreed settlement was reached in which the judgment was discharged by the payment of $6,250 in cash, the transfer of certain corporate stocks, and the conveyance of three tracts of land in Texas. One of the three tracts is the tract involved in this action. Title to the land was not taken in the name of Amey Thlocco, but to Kenneth Mainard, Trustee. This action was taken upon the advice of M. F. Robert-

son, United States Indian Probate Attorney,[3] whose reason was that, by taking title in Mainard's name as Trustee, control of the property could be retained in Oklahoma. The attorneys representing Mainard accordingly directed Fidelity Union Insurance Company to execute the conveyance in favor of Kenneth Mainard, Trustee, and this was done.

At the time Kenneth Mainard, Trustee, executed the oil and gas lease to Bat Shunatona, as lessee, he advised Probate Attorney Dennis Petty (who had succeeded M. F. Robertson in the Wewoka District) of the offer he received from Shunatona, and he had also filed a petition with the County Court of Seminole County, under whose jurisdiction he served as guardian, requesting that the sale of the lease be authorized.[4] Probate Attorney Petty recommended the sale of the lease to Shunatona (Petty's testimony R. 450), and the said County Court ordered the sale on February 14, 1936. None of these matters were brought to the attention of Magnolia, however, at the time it purchased

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[3]In Oklahoma the United States Probate Attorneys for the Indians are "local representatives of the Secretary of the Interior." They derive their authority under Sec. 6 of the Act of Congress approved July 27, 1908 (35 Stat. 312). Their duties are to advise and represent full blood Indians in all matters connected with their "restricted" lands, although it is the practice of these attorneys to assume the right to represent Indians, whether restricted or unrestricted, whenever they so desire and regardless of whether the particular Indian desires such representation. (Testimony J. H. Finley, Supervising Probate Attorney, R. 460 et seq.) The Indian Country in Oklahoma is divided into six districts for the purpose of dividing areas of service for these attorneys. There is a probate attorney for each district and a Supervising Probate Attorney at the United States Indian Agency at Muskogee, Oklahoma. J. H. Finley was Supervising Attorney in 1936 and still holds that office, and M. F. Robertson was Probate Attorney of the Wewoka District at the time that suit was filed.

[4]It is not here contended that a County Court in Oklahoma would have any jurisdiction to approve a lease on lands located in Texas; it does appear, however, that Mainard was seeking assistance in the leasing of the land from all of the authorities who were asserting any right to control the estate of Amey Thlocco.

its lease. The abstract showed a straight chain of title into Kenneth Mainard, Trustee, without mention of Amey Thlocco, the last conveyance being the deed from Fidelity Union Insurance Company to Kenneth Mainard, Trustee, dated November 15, 1934 (R. 131).

Much of the evidence adduced at the trial of the case has been omitted in the foregoing statement. Such additional evidence as may be necessary to explain a proposition hereinafter asserted will be supplied in the argument thereunder.

The cause was tried in the District Court of the United States for the Eastern District of Texas on February 1 and 2, 1943, and all issues were decided in favor of Magnolia Petroleum Company. Original findings of fact and conclusions of law made by the trial court are shown at pages 53 to 65, inclusive, of the Record. Supplemental findings of fact made at the instance of petitioners appear at pages 66 to 72, inclusive, of the Record. The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court (141 Fed. (2d) 934).

QUESTIONS PRESENTED

In the Petition for Certiorari herein (page 2 et seq.) the questions presented are stated to be twelve in number. Certain of them are cumulative, however, and in the interest of brevity respondent's brief is presented under the following propositions:

(1) Federal Indian restrictions are not applicable to the alienation of these lands. (Counter to Petitioners' Questions 1 and 2)

(2) **The laws of Texas, and not Oklahoma, are determinative of Amey Thlocco's capacity to deal with lands owned by her in Texas.** (Counter to Petitioners' Questions 3, 4, 5 and 6)

(3) **Article 7425a, Revised Civil Statutes of Texas and the decisions of Texas courts authorized Magnolia to purchase the lease executed by Kenneth Mainard, Trustee, as the owner of the land, without obligation to inquire as to the beneficial interest therein.** (Counter to Petitioners' Questions 7 and 8)

(4) **Magnolia Petroleum Company was a bona fide purchaser for value.** (Counter to Petitioners' Questions 9 and 10)

(5) **Under Texas law Amey Thlocco was sui juris and, by accepting royalties with full knowledge of all the facts, she ratified and confirmed Magnolia's lease.** (Counter to Petitioners' Question 11)

(6) **There are no opinions of this Court, or of the Circuit Courts, in conflict with the opinion rendered by the Circuit Court of Appeals in this case.** (Counter to Petitioners' Question 12)

(7) **Petitioners are barred from attacking Magnolia's lease under the various statutes of limitation of the State of Texas.** (Not mentioned by Petitioners)

(8) **The absence in this action of parties owning one-half mineral and royalty interests is fatal to petitioners' right to cancel the lease, and deprives the Court of jurisdiction to entertain the cross-action.** (Not mentioned by Petitioners)

SUMMARY OF THE ARGUMENT

I

No grounds exist which justify the exercise by this Court of its power to grant a writ of certiorari. The principal issues are disputed fact questions, which have been found adversely to petitioners by the trial court and the Circuit Court of Appeals. The legal principles involve only matters of local law, and the decisions of the State of Texas have been followed.

II

On the merits, petitioners' contentions are not tenable for these reasons:

1. Federal Indian restrictions are not applicable here because they do not apply to lands located in the State of Texas; the control of alienation of private property in Texas is purely a State function over which the Federal Government has no authority. Furthermore, the lands involved in this case were unrestricted, in any event, because: (1) they were not acquired through restricted funds, (2) title thereto was not taken in the name of the Indian, and (3) the deed contained no restriction against alienation.

2. The laws of Texas, and not of Oklahoma, determine Amey Thlocco's capacity to deal with her lands in Texas. An adjudication of incompetency to manage property in Oklahoma does not require a recognition of disability in Texas, where the only ground justifying the appointment of a guardian is that such person must be "of unsound mind."

3. Magnolia Petroleum Company could purchase a lease executed by Kenneth Mainard, Trustee, without inquiring as to the ownership of the beneficial interest in said land by reason of Article 7425a, Revised Civil Statutes of Texas, and the common law in Texas, of which said statute is cumulative. Furthermore, the deed to Mainard, Trustee, containing habendum to the grantee "and his heirs and assigns forever," empowered Mainard to sell and convey the property under Texas decisions.

4. Magnolia Petroleum Company was a bona fide purchaser for value. Whether or not Magnolia was required to deal with the beneficiary, if known, in the purchase of its lease, the overwhelming weight of the evidence, as found by both of the Courts below, shows that the Company had no notice of Amey Thlocco's interest in said lands at the time it purchased its lease.

5. Under Texas law Amey Thlocco was sui juris. She knew that Mainard had taken title to the land as trustee; that he had executed a lease to Magnolia Petroleum Company; that the Company had drilled a number of wells on the land; that Mainard was collecting royalties therefrom and paying the money to her; and that she was getting $600 per month as such royalty. Therefore, she ratified and adopted the lease.

6. There are no opinions of this court, or of the Circuit Courts, in conflict with the opinion rendered by the Circuit Court of Appeals in this case.

7. The statutes of limitation of the State of Texas are a complete bar to the attack on Magnolia's lease. The un-

contradicted evidence shows: (1) that Magnolia had been in peaceable adverse possession of its mineral rights for more than five years prior to the filing of this case, (2) under conveyance duly executed and recorded, showing title from the sovereignty of the soil, and (3) had been making timely payment of ad valorem taxes on such minerals. These facts clearly bring the case within the provisions of Articles 5507 and 5509, Revised Civil Statutes of Texas, known, respectively, as the three year statute and the five year statute of limitations in the State of Texas.

8. At the time this action was filed Amey Thlocco owned only an undivided one-half interest in the royalty and mineral rights in this land. In Texas an oil and gas lease contract is indivisible, and the absence from this action of parties owning the remaining one-half mineral interest is fatal to petitioners' right to cancel the lease.

ARGUMENT

I

No grounds exist which justify the exercise by this Court of its power to grant a writ of certiorari.

1. *This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.* Under well-established principles, the power of this court to grant writs of certiorari under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347a) and Rule 38 of the Supreme Court Rules, rests in the discretion of the Court. As promulgated in the Rules and as often stated

by this Court, this is a power to be exercised sparingly, and only in cases where there are special and important reasons therefor, or in order to secure uniformity of decisions.

As will hereinafter appear, this case will be finally reduced to the sole question of whether or not Magnolia Petroleum Company had the right to purchase the lease executed by Kenneth Mainard, Trustee, without any obligation to inquire as to the ownership of the beneficial interest in the lands covered by the lease. This is purely a matter of local law, governed by the statutes and the decisions of the State of Texas. The Supreme Court of Texas has passed directly upon this issue in the case of *Gulf Production Company v. Continental Oil Company*, 139 Tex. 183, 164 S. W. (2d) 488, and it was the duty of the Courts to follow the law as construed in that case.

2. *The Circuit Court of Appeals in rendering its decision disregarded no controlling Texas decision.* Both the trial court and the Circuit Court of Appeals followed the Texas law as interpreted in *Gulf Production Company v. Continental Oil Company*, supra. This decision was by the Supreme Court of Texas. The Texas decisions upon which petitioners profess to rely do not support their position. But even if they did, it will be observed that these decisions were rendered by intermediate courts prior to the date of the decision in the Continental case. The opinion in the latter case is the last expression from the highest court in Texas.

II

With reference to the "Questions Presented" (Petition, 2) we present our counterarguments under the propositions hereinabove set forth.

1. **Federal Indian restrictions are not applicable to the alienation of these lands.** Petitioners persist in the statement that the funds misappropriated by Barham, as guardian of Amey Thlocco, were "restricted funds," although there is no evidence to support such an assertion and the statement has been challenged at every stage of this proceeding. "Restricted funds" are funds belonging to restricted Indians and under the supervision and control of the Secretary of the Interior. In his deposition in this case Supervising Probate Attorney J. H. Finley defined restricted funds as follows:

> "Any money that is in the Treasury of the United States under the supervision of the Secretary of the Interior, and credited to a half blood or more, I consider restricted."

In United States v. Williams, 139 Fed. (2d) 83 (certiorari denied 64 S. Ct. 943, 88 L. Ed. 839, rehearing denied 64 S. Ct. 1258, 88 L. Ed. 1186), the Court held:

> "The royalties derived from the restricted allotment were held in trust by the Secretary of the Interior for the benefit of William Bushyhead *and continued to be restricted while so held.*" (Emphasis ours)

The very words "restricted funds" import their own meaning. Inasmuch as restrictions on Indians generally are exercised by the Secretary of the Interior, it naturally

follows that restricted funds are those under the control of the Secretary of the Interior.

Therefore, if Barham had control of Amey Thlocco's funds, they were not under the control of the Secretary of the Interior. Barham couldn't embezzle funds reposing in the Treasury of the United States. No effort has been made in this case to trace the source of funds which were misappropriated by Barham; the record is completely silent as to how these funds were derived. But the fact that they were in the possession of Barham and not under the control of the Secretary of the Interior is the only circumstance required to show that they were unrestricted.

Yet if it should be conceded that the funds were restricted funds, it would not follow that these lands were subject to restrictions upon alienation. Not all lands acquired through purchase with restricted funds are subject to restrictions upon alienation. In addition thereto, there must be a clause in the deed to the Indian restricting alienation thereof without the consent or approval of the Secretary of the Interior. Section 1 of the Act of Congress of July 27, 1908 (35 Stat. 312) provided for restrictions upon the alienation of lands allotted to Indians, and also provided for removal of restrictions by the Secretary of the Interior wholly or in part, under such rules or regulations concerning the terms of sale and disposal of the proceeds for the benefit of the respective Indians as he "may prescribe." Pursuant to such statutory authority, the Secretary of the Interior prescribed a rule providing that, where land was purchased for a restricted Indian with restricted funds, the same should be evidenced by "a conveyance of

such lands to be made on a form of conveyance containing an habendum clause against alienation or encumbrance until April 26, 1931." *United States v. Williams*, supra.

On June 27, 1928 the rule was amended so as to provide for a restrictive clause in such deeds which should prohibit the alienation of any such lands "unless approved by the Secretary of the Interior or the restrictions from said land are otherwise removed by operation of law." 25 Code of Federal Regulations, sec. 241.44; *United States v. Williams*, supra. No deed was executed to Amey Thlocco. The deed to Kenneth Mainard, Trustee, contained no clause restricting alienation.

In United States v. Williams, supra, the court said:

> "The land purchased by such funds continued to be restricted until April 26, 1931, by virtue of the rule above quoted *and the restrictive clause in the deed.*" (Emphasis ours)

Citing *Sunderland v. United States*, 266 U. S. 226; *Mott v. United States*, 283 U. S. 747, and other authorities.

It is, therefore, clear that there were no restrictions on alienation of this land for the reasons: (1) the lands were not purchased with "restricted funds" for the benefit of the Indian; (2) title to the lands has never vested in Amey Thlocco, the Indian; and (3) there was no restrictive clause in the deed by which alienation was in any way restricted.

Furthermore, it was never intended by Congress that restrictions upon alienation of the lands of Indians of the Five Civilized Tribes should exist in any State other than

the State of Oklahoma. The right to restrict alienation of Indian lands in Oklahoma was reserved by the Federal Government at the time of the erection of the State of Oklahoma. Otherwise, such power would not have been retained in the United States, for it is the general rule that the power of a State to control the disposition of real estate within its boundaries is exclusive. The Constitution conferred no power of control upon the Federal Government in such matter. "The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of Federal authority." *United States v. Fox*, 94 U. S. 315. "A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the Federal Government has no power." *Thurlow v. Massachusetts*, 5 How. 588. There are many decisions of this Court holding that the alienation of real estate is under the exclusive control of the State in which the real estate is located. *Oakey v. Bennett*, 11 How. 33; *McGoon v. Scales*, 9 Wall. 23; *Olmsted v. Olmsted*, 216 U. S. 386; *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65; *Arndt v. Griggs*, 134 U. S. 316; *Langdon v. Sherwood*, 124 U. S. 74; *United States v. Illinois C. R. Co.*, 154 U. S. 225.

In Oklahoma, however, the situation is different from that of the other States. The lands in Indian Territory which were ceded by treaty to the Five Civilized Tribes, are now a part of the State of Oklahoma. Prior to statehood, Congress possessed and exercised control of the alien-

ation of lands belonging to the Indians, and this right was retained by the Federal Government in the Acts by which Oklahoma acquired statehood. Section 1 of "An act to Enable the People of Oklahoma and of Indian Territory to Form a Constitution and State Government," known as The Enabling Act, which was passed by Congress and approved June 16, 1906, provided that the people of Oklahoma might adopt a constitution and become the State of Oklahoma, provided that nothing therein should "limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties" etc. The Enabling Act was accepted by the people of Oklahoma in their Constitutional Convention on April 22, 1907. (Const., Okla. Stat. Ann., p. 219). The Constitution adopted by the State of Oklahoma (Article I. Sec. 3) expressly recognizes the right of the United States to control the alienation of Indian lands. Thus, there can be no question about the right of Congress to impose restrictions on the lands of Indians in the State of Oklahoma.

In Texas no such power was retained by the Federal Government when Texas became a state. Texas was admitted to the Union on December 29, 1845 by a joint resolution of the United States Congress (5 U. S. Stat. 797; 9 U. S. Stat. 108; *Group No. One Oil Corporation v. Bass*, 38 Fed. (2d) 680) "on an equal footing in all respects with the original States." (*United States v. State of Texas*, 162 U. S. 1) In said resolution the Federal Government acquired no control over the private ownership of lands in Texas. These lands were originally under the Republic of Texas,

and control thereover became vested in the State of Texas to the exclusion of any Federal authority. Consequently, Congress had no power to place any restriction upon the alienation of Texas lands. Such control is purely a function of the State government.

It is submitted that the principles stated above are controlling on the issue of whether this land was restricted. Moreover, the authorities cited by petitioners do not support their position under any theory. The case of *Murray v. Ned*, 135 Fed. (2d) 407, is not in point. There the Court said that "the single issue presented is whether the latter Act reimposes restrictions on land from which restrictions have been removed, when the land descends to fullblood Indian heirs." There is no question here of *reimposing* restrictions; no restrictions have ever attached to this land. The other authorities cited by petitioners deal with questions entirely different from the issue in this case.

2. The laws of Texas, and not Oklahoma, are determinative of Amey Thlocco's capacity to deal with lands owned by her in Texas. The capacity to take, hold, and transfer realty is governed by the lex loci rei sitae (15 C. J. S. 923, 924 and authorities cited; Restatement, Conflict of Laws, Sec. 216).

Amey Thlocco is not a person of unsound mind. She was adjudged by an Oklahoma probate court to be "mentally incompetent to manage her said estate without assistance." The Oklahoma statute on guardianship (Sec. 851, Title 58, Okla. Stat. Ann.) provides for the appointment of guardians for two classes of persons, (1) one who is "insane,"

and (2) one who is "from any cause mentally incompetent to manage his property."

In Texas the rule is different. There is no provision of the Texas statute authorizing the appointment of a guardian for one who is merely incompetent to manage his property. The test of jurisdiction to appoint a guardian in Texas is that such person must be "of unsound mind." Articles 4102 and 4267, Revised Civil Statutes of Texas. A person whose only disability is that he is not "mentally competent and capacitated to manage, care for and preserve his estate" is not subject to guardianship in Texas. *Greenwood v. Furr*, 251 S. W. 332.

In Oklahoma an adjudication of incompetency to manage property is not an adjudication of unsoundness of mind. *In re Nitey's Estate*, 175 Okla. 389, 53 Pac. (2d) 215; *Shelby v. Farve*, 33 Okla. 651, 126 Pac. 764.

To summarize, the only disability authorizing the appointment of a guardian in Texas is that of unsoundness of mind. The Supreme Court of Oklahoma has held *(In re Nitey's Estate*, supra) that an adjudication of incompetency to manage business is not an adjudication of unsoundness of mind. Yet, petitioners assert that the Federal courts in Texas should recognize the adjudication of incompetency to manage business in Oklahoma as creating a disability in Texas, where no such grounds for disability exist. In other words, they are asserting that Texas courts and Federal Courts in Texas should accord Oklahoma judgments broader effect than the Oklahoma Courts themselves will recognize. The Full Faith and Credit Clause of the Federal Con-

stitution does not require any such recognition. It only requires that judgment of a sister state shall have such validity and effect in every other court in the United States which it would have in the State where it is pronounced, and that whatever pleas would be good to a suit brought thereon in such State, and none others, can be pleaded in any other court of the United States. *Williams v. North Carolina*, 317 U. S. 287; *Fauntleroy v. Lum*, 210 U. S. 230.

When the matter of Amey Thlocco's competency was presented to the trial court in connection with the ownership of Texas land, the Court was limited to a consideration of whether she would be under disability in Texas. The trial court found that she was a person of sound mind at the time Fidelity Union Insurance Company conveyed the land to Kenneth Mainard, Trustee, and has been of sound mind continuously since that date down to the time of trial (Finding of Fact No. 7, R. 57). And in its conclusions of law the Court held (Conclusion No. 11, R. 64) that Amey Thlocco is not a person non compos mentis under the laws of the State of Texas. Five witnesses testified that Amey Thlocco was of sound mind, and there was no testimony to the contrary. The Record contains (p. 413) a stipulation by Honorable Orel Busby, counsel for Amey Thlocco, that she is not an insane person but merely incompetent to manage her property unassisted.

No court has held Amey Thlocco to be an insane person. She is an uneducated full-blood Indian with limited business experience, but her mind is sound. The case of *Kiker et al. v. United States*, 63 Fed. (2d) 957, is referred to, and

petitioners erroneously state that Amey Thlocco was there held to be a person of unsound mind. As a matter of fact, the Court found only that she had been defrauded, but also found specifically (p. 958) that she thoroughly understood the transaction and knew the purport of the deed and the effect it would have on her interest.

Since she was not a person of unsound mind, she was not under disability in Texas, and her acts and conduct in connection with the ownership of this land are to be governed and interpreted by the laws of Texas.

No fraud was plead or proved in this case. As said by the Circuit Court of Appeals (141 Fed. (2d) 935, Note 2): "The 8th finding of the District Judge was: 'No fraud has been pleaded or charged against the plaintiff, Magnolia Petroleum Co., and none has been proved,' and the record fully supports this finding."

Therefore, the sole question here is whether or not Amey Thlocco was under disability in Texas; the adjudication of incompetency to manage business in Oklahoma does not affect the situation here.

3. **Article 7425a, Revised Civil Statutes of Texas, and the decisions of Texas courts authorized Magnolia to purchase the lease executed by Kenneth Mainard, Trustee, as the owner of the land, without obligation to inquire as to the beneficial interest therein.** The provisions of this statute have already been stated (Note 1). These provisions are plain. The law was enacted for the specific purpose of protecting those who purchase from trustees, and relieving them of the necessity of ascertaining the identity

of the beneficiaries in such a trust, and securing consent or approval of the trustee's conveyance from them. The statute has been interpreted and upheld by the Supreme Court of Texas in *Gulf Production Company v. Continental Oil Company*, 139 Tex. 183, 164 S. W. (2d) 488, and the case is directly in point here. The Circuit Court of Appeals so found. 141 Fed. (2d) 937.

Magnolia's lease was executed by Kenneth Mainard, Trustee. Title was acquired by Kenneth Mainard, Trustee, from Fidelity Union Insurance Company by deed which contained no trust provisions; it was merely a straight deed, naming the grantee as Kenneth Mainard, Trustee. There was nothing in the record to show that Amey Thlocco was the beneficiary.

Moreover, Section 7425a, supra, is but cumulative of the common law as it existed in Texas at the time the Act was passed. *Barker v. Temple Lumber Company* (Tex. Com. App.) 12 S. W. (2d) 175, held that where a conveyance was made to a person as trustee without showing on its face the nature of the trust or the name of the beneficiary, the word "trustee" must be regarded only as descriptio personae.

Furthermore, it is the rule in Texas that, where a conveyance of this character is made to an individual as trustee and the habendum clause provides that the property shall be held by the grantee and "his heirs and *assigns* forever," the grantee is thereby empowered to sell the property without any restrictions whatever. The inclusion of the word "assigns" in such clause creates the power. *Craw-*

ford v. El Paso Land Improvement Company (Tex. Civ. App.), 201 S. W. 233; *Gabert v. Olcott* (Tex. Supreme Court), 86 Tex. 121, 23 S. W. 985. The deed to Kenneth Mainard, Trustee, had an habendum containing the words "unto the said Kenneth Mainard, Trustee, his heirs and assigns forever." Thus, this case falls squarely within the rules announced in the two cases last cited.

4. **Magnolia Petroleum Company was a bona fide purchaser for value.** Petitioners contend that Magnolia had notice of Amey Thlocco's beneficial interest in the land at the time it purchased its oil and gas lease, and proceed on the theory that, if Magnolia had such notice, it was required to deal with the beneficiary. This theory is erroneous. Under the preceding proposition it is clear that the trustee may sell and convey, and the purchaser may buy from the trustee, regardless of whether the identity of the beneficiary is known. However, the facts overwhelmingly show that Magnolia had no such notice, and the trial court so found (Finding No. 3, R. 55). This finding is fully supported by the testimony of Ledbetter, who sold the lease, and of all the representatives of Magnolia who participated in the purchase. The Court's finding was made on this testimony, and the Circuit Court of Appeals held that the finding was amply supported by the testimony. Therefore, any discussion of the testimony on which this finding was based is pretermitted.

At page 31 of the petition it is asserted that Magnolia was not an innocent purchaser because it had actual notice of Amey's ownership through its lease buyer, Dunaway, who lived at Wewoka, Oklahoma. Dunaway was one of

about thirty-five "leasers" employed by Magnolia in the nine States in which it was doing business in 1936. A leaser is one whose duty it is to report on conditions in a certain district assigned to him, and submit to the Company for purchase such leases as the leaser would recommend. Dunaway's district comprised about fifteen counties in Northeastern Oklahoma; the land here involved was located in the State of Texas. The uncontradicted evidence of Magnolia officials was to the effect that no leaser had authority to purchase a lease or handle any transaction involving acreage outside of his own district, and it is not claimed that Dunaway had anything to do with the purchase of this lease. It is claimed, however, that Dunaway knew of the existence of Amey Thlocco's beneficial interest because he lived in the same county in which Amey Thlocco lived, and two witnesses, one an itinerant lease broker and the other a discharged employee of the United States Indian Agency, testified as to certain alleged conversations that they had had with Dunaway, wherein Dunaway had evidenced knowledge of the fact that Amey owned some lands in Titus County, Texas. Dunaway died June 12, 1941, nearly two years prior to the date on which this case was tried.

Much testimony was offered to impeach the witnesses who testified as to Dunaway's knowledge of Amey's ownership. The two witnesses did not identify any particular tract of land. Their conversations with Dunway were private conversations, based on general rumor, and did not involve a sale of the land or lease. Furthermore, all of Dunaway's superiors testified that he had never advised them of any knowledge he may have had of Amey Thlocco's

interest in the land. United States Probate Attorney Petty testified that when the lease was sold to Shunatona in February, 1936 he asked Dunaway for some information about the area, and Dunaway said he knew nothing about it. It is submitted that the Court very correctly held that Dunaway had no knowledge of such ownership, or that, if he did have personal knowledge of it, he never brought it to the attention of his Company.

The Courts of Texas have held that testimony which concerns only conversations with a deceased person is "the weakest and the most unsatisfactory kind of evidence." *Coats v. Elliott*, 23 Tex. 613; *Logan v. Logan* (Tex. Civ. App.), 112 S. W. (2d) 523. Again, the rule in Texas is that, where it is sought to impute to the principal the knowledge of an alleged agent, the agent must be one who is empowered to act for the principal "with reference to the very subject-matter to which the notice relates." *Missouri-Kansas-Texas Ry. Co. v. Belcher*, 88 Tex. 549, 32 S. W. 519; *Taylor v. Taylor*, 88 Tex. 47, 29 S. W. 1057; *Hines v. Chaddick* (Tex. Civ. App.), 63 S. W. (2d) 263; *Adams v. La Salle Life Ins. Co.* (Tex. Civ. App.), 99 S. W. (2d) 386. Furthermore, it is held in Texas that one is not put on inquiry by mere rumor or suspicion, nor by the existence of a common reputation in the neighborhood that a third person has an interest in the property. 43 Tex. Jur. 676; *Strong v. Strong*, 128 Tex. 470, 98 S. W. (2d) 346.

It is submitted, therefore, that the Court's findings (Finding 4, R. 55) and conclusions to the effect that any private knowledge, if any, on the part of the deceased leaser, Dunaway, was not binding on Magnolia Petroleum

Company, are amply supported by the evidence and the authorities.

5. **Under Texas law Amey Thlocco was sui juris and by accepting royalties with full knowledge of all the facts, she ratified and confirmed Magnolia's lease.** Amey Thlocco gave a deposition in this case (R. 327). She testified (1) that Kenneth Mainard told her about acquiring the land in Texas as a result of the Barham lawsuit, and that he was going to take the title in his name as trustee for her and she agreed to it; (2) that she knew about the execution of the lease to Shunatona and that the lease was later acquired by Magnolia Petroleum Company; (3) that she knew Magnolia had drilled oil wells on the land and she was getting $600 per month from that source; (4) that Kenneth Mainard received the money, and either turned it over to her or deposited it;[5] (5) that all of the money that she had received for more than a year had come from royalty under Magnolia's lease, as the Government ceased sending her monthly payments out of the restricted funds she had on deposit at the Indian Agency at Muskogee, Oklahoma (then amounting to $140,000) when it was learned that she was receiving income from the Magnolia lease; (6) that she was satisfied to have Magnolia operating her

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[5]Kenneth Mainard, as guardian, accounted to the probate court of Seminole County, Oklahoma, for all royalties received under the Magnolia lease, amounting to a total of $35,070.16. Counsel for Amey Thlocco (the same counsel who appears in this case) contested the approval of Mainard's guardianship accounts, contending he had misappropriated some of the funds. In a contested hearing the Court found that Mainard had accounted faithfully for all funds received except $233.07, which the Court did not find to have been misappropriated but merely not satisfactorily explained (R. 839, 595). Hence, petitioners' charge that Mainard was faithless as guardian and trustee (Petition, 27) finds no support in the evidence.

property in Texas, provided that there was no fraud, and she knew of none; and (7) that she was not advised that suit would be brought against Magnolia Petroleum Company.

The Court found that she was not a person non compos mentis under the law of Texas, then made the finding that her own testimony fully supported the pleas of ratification, estoppel, waiver and laches (R. 57-64).

No claim is made that such evidence would not be sufficient to establish ratification. The defense thereto is that Amey Thlocco had no capacity to ratify the lease. This question has already been discussed under Proposition number 2, supra.

6. There are no opinions of this Court, or of the Circuit Courts, in conflict with the opinion rendered by the Circuit Court of Appeals in this case. Petitioners have cited no opinions of this Court, or of the Circuit Courts, which conflict with the opinion rendered by the Circuit Court of Appeals of the Fifth Circuit in this case. As we have heretofore pointed out, the case of *Murray v. Ned*, 135 Fed. (2d) 407, deals with an issue entirely different from the question in this case. The same is true of *United States v. Brown*, 8 Fed. (2d) 564. Reference to these cases will show that they are not in point. Further discussion on comparison of these cases is believed to be unnecessary.

7. Petitioners are barred from attacking Magnolia's lease under the various statutes of limitation of the State of Texas. Independent of any other claim, this proposition is completely decisive of this case. Magnolia entered into

possession of its mineral estate on these lands on October 3, 1936, and commenced the drilling of a well for oil and gas. It has remained in possession continuously, drilling and operating the property for the production of oil. The parties hereto have stipulated that such possession has been peaceable and adverse down to the date of the filing of the suit and of the answers of opposing parties herein, and that such possession has been held by record title thereto from the sovereignty (R. 130 and 148). More than five years had elapsed between the time Magnolia entered into such possession and the date of the filing of this suit on April 24, 1942.

Article 5507, Revised Civil Statutes of Texas, provides that suits to recover real estate against a person in peaceable and adverse possession thereof under title shall be instituted within three years next after the cause of action accrued. Under the terms of the stipulations the petitioners were barred under this statute. Article 5509, Revised Civil Statutes of Texas, provides that every suit to recover real estate against a person having peaceable and adverse possession of lands and paying taxes thereon, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued. The three requirements of (1) possession, (2) paying taxes, and (3) claiming under a deed or deeds duly registered, are all present in this case, and the Court found correctly that peitioners were barred under this statute, also.

In Texas oil and gas are susceptible of ownership, seprately from the surface of the land, and an oil and gas

lease severs the mineral estate from the remainder of the fee. *Texas Company v. Daugherty*, 107 Tex. 226, 176 S.W. 717. It is also well settled that statutes of limitation applicable to real estate apply with equal force to mineral rights, since the ownership of mineral rights constitutes ownership of real estate. *Hanks v. Magnolia Petroleum Company* (Tex. Civ. App.), 14 S.W. (2d) 348, affirmed 24 S.W. (2d) 5; *Clements v. Texas Co.*, 273 S. W. 993; *Laird v. Gulf Production Co.*, 64 S.W. (2d) 1080, writ dismissed; *Broughton v. Humble Oil and Refining Company*, 105 S. W. (2d) 480; 7 Texas Law Review, 568-580.

Indeed, no defense is made that the facts sustaining the statutes of limitation are not present. The purported defense to such plea is the alleged unsoundness of Amey Thlocco's mind. This position is untenable. In Texas the rule is that, where legal title to property is vested in a trustee, limitation runs against the cestui from the time that the trustee becomes entitled to sue. In other words, the beneficiary is barred when the trustee is barred. *Collins v. McCarty*, 68 Tex. 150, 3 S. W. 730, 2 Am. St. Rep. 475. And the rule applies with equal force even though the beneficiary may be a person of unsound mind. *Broussard Trust et al. v. Perryman* (Tex. Civ. App.), 134 S. W. (2d) 308, 313(error refused). Thus, the statutes of limitation are applicable regardless of whether Amey Thlocco was sui juris or non compos mentis.

8. **The absence in this action of parties owning one-half mineral and royalty interest is fatal to petitioners' right to cancel the lease, and deprives the Court of jurisdiction to entertain the cross-action.** At the time Amey Thlocco

filed her pleading seeking affirmative relief against Magnolia she was the owner of an undivided one-half interest in the royalty and mineral rights. An undivided one-half interest had theretofore been conveyed by Kenneth Maynard, Trustee, to one J. B. Terry, and was owned by the said J. B. Terry and his assigns. The rule in Texas is that an oil and gas lease is an indivisible contract, and when rescinded it must be rescinded as a whole, both as to parties and subject matter. The owners of the outstanding one-half interest in the minerals did not join in the suit to cancel Magnolia's lease. The absence of these parties from the action is fatal to the attempt to cancel the lease. *Sharpe v. Landowners Oil Assn.*, 127 Tex. 147, 92 S. W. (2d) 435; *Royal Petroleum Corp. v. McCallum*, 135 S. W. (2d) 958; 10 Tex Jur. 392 and authorities there cited.

The defense of petitioners to this proposition is that, in the litigation they had with J. B. Terry and his assigns in Oklahoma, there was contained in the judgment a provision that the judgment should not estop Amey Thlocco from instituting or maintaining a suit to recover property belonging to her other than the interest involved in that action. The complete answer to such contention is that Magnolia Petroleum Company was not a party to the Oklahoma action and did not give its consent to the entering of any such judgment. Certainly, such a provision in that judgment could not deprive Magnolia of any of its contractual rights under its said lease, nor could it enlarge any rights or privileges on the part of the lessors in said lease with regard to bringing a suit for cancellation. This

principle is so fundamental that we omit any further discussion thereof.

CONCLUSION

The principal legal question asserted by petitioners is that the Federal Government may impose restrictions upon the alienation of lands in Texas. Under many decisions of this Court it is submitted that this proposition must be rejected. The power to control the alienation of real estate in Texas is purely a matter of State law.

The remaining issues in the case are principally fact questions, and each and every fact necessary to a decision of this case has been decided adversely to petitioners, both by the trial court and the Circuit Court of Appeals. Under these conditions it is submited that this Court will not undertake to review the facts.

It is, therefore, respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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